TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 168

THE UNITED STATES, PETITIONER

vs.

PEWEE COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 30, 1950
CERTIORARI GRANTED OCTOBER 9, 1950

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INDEX

1 In the Court of Claims of the United States

No. 46541

PEWEE COAL COMPANY, INCORPORATED

v.

THE UNITED STATES

Petition

Filed Sept. 4, 1945

To the honorable the Court of Claims:

The plaintiff, Pewee Coal Company, Incorporated, respectfully represents that:

I

The plaintiff is, and at all times mentioned herein has been, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business in the city of Knoxville, Tennessee, and engaged in the business of mining and marketing bituminous coal.

2 II

On May 1, 1943, the plaintiff was the owner and operator of, and had the sole and lawful use, possession, and control of, a bituminous coal mine known as and called Pewee mine, Mine Index No. 605, located at Garland, Campbell county, Tennessee.

III

On May 1, 1943, the United States, through the Secretary of the Interior, under the authority of Executive Order No. 9340, dated May 1, 1943 (8 FR 5695), seized and took from the plaintiff without its consent the entire use, possession, and control of Pewee mine.

IV

From May 1, 1943, continuously to and including October 12, 1943, the United States, through the Secretary of the Interior and the Solid Fuels Administrator for War, used, possessed, controlled, and operated Pewee mine.

V

The cost of operating Pewee mine, during the period of use, possession, control, and operation of the mine by the United

States, as aforesaid, exceeded the receipts and income derived from such operation by the amount of $42,539.23, which loss the United States has wrongfully required the plaintiff to bear. As a result of the use, possession, control, and operation of Pewee mine by the United States, the plaintiff therefore suffered loss and damage in the amount of $42,539.23.

3 VI

The plaintiff claims from the defendant the sum of $42,539.23, with interest, as compensation for the loss and damage sustained by the plaintiff by reason of the use, possession, control, and operation of Pewee mine by the United States.

VII

The claim herein is made under and based upon the following, among other, provisions of law:

Amendment 5, Constitution of the United States Judicial Code, Section 145.

VIII

No other action has been had upon the claim herein in Congress or by any of the departments or by any other agency of the United States. The plaintiff avers that it has at all times borne true allegiance to the Government of the United States and has at no time in any way aided, abetted, or given encouragement to rebellion against the said Government; that the plaintiff is the sole owner of the claim herein; and that no part of the claim has ever been sold, assigned, or discharged. The plaintiff is justly entitled to recover the amount herein claimed from the United States after allowing all just credits and offsets.

WHEREFORE, the plaintiff prays judgment against the United States in the sum of $42,539.23, with interest, and for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

PEWEE COAL COMPANY,
INCORPORATED,
Plaintiff.

By: /sgd./ ANSELL AND ANSELL,
Its Attorneys.

4 [*Duly sworn to by Burr Tracy Ansell, jurat omitted in printing.*]

5 *General traverse*

Filed October 15, 1945

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S) JOHN F. SONNETT,
Acting Head, Claims Division.

H. W.
S. R. G.
E. E. E.

Argument and submission of case

On October 4, 1949, the case was argued and submitted on merits by Mr. Burr Tracy Ansell for plaintiff, and by Mr. Robert E. Mitchell for defendant.

7 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J. Dissenting opinion by Madden, J.*

Filed February 6, 1950

Mr. Burr Tracy Ansell for the plaintiff.
Mr. Robert E. Mitchell, with whom was Mr. Assistant Attorney General H. G. Morison, for the defendant.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following:

Special findings of fact

1. Plaintiff is a corporation organized in August 1939 with an authorized capital stock of $150,000, and doing business under the laws of the State of Tennessee, with its principal office in the City of Knoxville, Tennessee. It is engaged in the business of mining (by machine methods) and marketing bituminous coal taken from the Pewee mine located at Garland, Campbell County, Tennessee, on property owned chiefly by the Coal Creek Mining and Manufacturing Co., and partly by the East Tennessee Iron and Coal Company, landholding corporations which pooled the acreage of three contiguous tracts and by joint agreement dated November 28, 1939, leased same to plaintiff for a period of 40 years with an option to renew for a further term of 30 years. The coal-mining

property is within Producing District No. 8, established under the Bituminous Coal Act of 1937 (50 Stat. 72), and is identified by Mine Index No. 605. It is served by an extension
8 of the Tennessee Railroad constructed for that purpose under a joint agreement between plaintiff, the railroad, and the Coal Creek Co. On May 1, 1943, plaintiff's authorized and outstanding capital stock was $200,000.

2. The plaintiff's mine was first opened and developed in 1940. It passed from the development state to production in the early part of 1941. Thereafter it continuously produced coal until April 1943, with the exception of a period in the spring of 1941 when there was a national strike of mine workers.

The coals produced by the plaintiff from its mine were marketed principally in the southeastern United States with a lesser tonnage moving to and across the Great Lakes and with a very small tonnage moving all-rail into the central states. The larger proportion of the coal produced was sold for domestic application (house or space heating) while the remainder (15 percent) was directed to industrial use.

3. Bituminous coal is primarily an industrial and commercial coal. About 43 percent of all energy produced in the United States is derived from it, including four-fifths of the energy used in driving locomotives on Class 1 railroads, about four-fifths of all fuels and energy-producing material used in the production of steel, and more than 50 percent of the energy used in the production of electric power by public utilities. Largely because of its great dependence on machines, the economy of the United States is peculiarly vulnerable to a stoppage in bituminous coal production. Such a stoppage in time of war, if prolonged, could well result in the most serious consequences to the Nation's military effort. At the time of the stoppages herein mentioned, there were about 2,850 bituminous coal mines in this country whose output exceeded 50 tons daily, accounting for some 95 percent of the total weekly production. Of the approximately 450,000 persons then employed in all bituminous coal mines, at least 90 percent were members of the United Mine Workers of America, hereinafter referred to as UMWA.

4. Plaintiff is a member of the Southern Appalachian Coal Operators Association. Its mine laborers, numbering approximately 150 men, are members of District 19, UMWA.
9 These associations were parties to a contract of July 5, 1941, known as the "Southern Wage Agreement," to a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and to a further agreement of February 11, 1943, known as the "Six-Day Supplemental Agreement,"

hereafter denominated the Wage Agreement. The terms and conditions of employment at plaintiff's mine, as well as at other mines in the Southern Appalachian Group, were governed by said wage agreements during the period from April 1, 1941, to March 31, 1943. For reasons which will shortly appear, there was no contract between the Southern Appalachian Coal Operators' Association and the United Mine Workers from April 1, 1943, until after termination of the period of Government possession here in question, except for a short extension of the 1941–43 contract.

5. When the United States entered the recent war the contracts expiring March 31, 1943, were in effect between the bituminous coal industry and UMWA. Contract-renewal negotiations got under way March 10, 1943, when representatives of the Union and the bituminous coal operators of the Northern Appalachian Region met in New York City. As part of its demands the union sought a wage increase of $2 per day and a minimum wage of $8 per day. Its president, John L. Lewis, announced that the miners would challenge the so-called "Little Steel" formula promulgated by the National War Labor Board, which permitted workers in general to receive an increase of up to 15 percent of their January 1, 1941, pay. He claimed the formula was unjustified in view of rising living costs. The northern operators promptly rejected these demands as involving prohibitive additional cost to the industry. On March 12, conferences began with the Southern Wage Operators' Group, and the union made the same demands. In the course of these meetings, Mr. Lewis informed the operators that "without a negotiated contract the miners will not trespass on your property on April 1." On March 19 they proposed extending the existing contracts until April 30, pending continued negotiations, but the union thought negotiations should continue only with the understanding that wage increases or other changes in the terms and conditions of employment would be retroactive to April 1. Maintaining that any changes should become effective "from the date approved and fixed by the governmental agency having jurisdiction," the operators then appealed to the President of the United States for Government intervention. In addition, the northern group asked the National War Labor Board, created by Executive Order No. 9017 of January 12, 1942, for the peaceful adjustment of labor disputes during the war period, to assume jurisdiction and resolve the issue as to the basis upon which work should be continued beyond April 1, pending a new agreement.

On the evening of March 22, 1943, the President of the United States intervened in the negotiations by sending the following telegram to officials of both operators' groups and to the UMWA president:

"The dispute between the United Mine Workers and the Bituminous Operators must be settled like any other labor dispute under the national no-strike agreement of December 26, 1941, by the peaceful means set forth in the Executive Order No. 9017 of January 12, 1942; that is, by collective bargaining, conciliation and final determination, if necessary, by the National War Labor Board.

"From the telegrams I have received from the committees representing the operators and from the press reports of various proposals made at the conference, it is evident that the time remaining before the expiration of the new contract on March 31 is too short. I, therefore, request the mine workers and the operators to follow the plan adopted at my suggestion in 1941, that is, to continue the uninterrupted production of coal under the terms and conditions of existing contracts until the differences that now separate the parties are peacefully and finally resolved with the understanding that if the new agreement includes any wage adjustments, such adjustments shall be computed and applied retroactively from April 1, 1943. If any wage adjustments are made they must, of course, be made in accordance with the Act of October 2, 1942, and Executive Order No. 9250. It would be unfair to the mine workers and to the operators unduly to prolong this period of uncertainty, and I am, therefore, asking everyone concerned to proceed with all speed consistent with the complete and fair-minded settlement of the dispute. If it is referred to agencies of the Government, I shall make the same request of those in charge of such agencies.

11 "If there is a wage adjustment within the standards set forth in the Act of October 2, 1942, and Executive Order No. 9250, the question of undue hardship to individual operators resulting from the agreement to make such adjustments retroactive to April 1, 1943, will be given due consideration by the agencies of Government concerned with costs and prices."

Thereupon the northern operators and UMWA signed an agreement extending negotiations and the existing contract for one month beyond April 1, with the understanding that "any increase in wages or improvement in hours or working conditions later agreed upon" would be retroactive to that date. Later a similar agreement was reached by the union and the southern operators, after the President had sent Dr. John R. Steelman, then Director of the United States Conciliation Service, Department of Labor, to intervene as his personal representative. Negotiations then continued in Dr. Steelman's presence, but agreement was not reached. On April 6, the southern group renewed a previous suggestion that the War Labor Board handle the dispute, and 3

days later officially asked that agency to assume jurisdiction. A similar request was made to the President on April 12. Concurrently the northern group proposed that the existing contract remain in force for the duration of the war.

6. On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several Government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula, that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law, and that excessively high prices be reduced. Although criticizing the order, Mr. Lewis offered to revise the union's wage demands by substituting therefor a guaranteed 6-day week throughout the year, and on April 13 Dr. Steelman made a similar proposal. It was rejected by the operators in both instances. On April 20 the Secretary of the Interior, Harold L. Ickes, joined the conferences in an effort to suggest a compromise solu-
12 tion, but this, too, proved futile. Two days later the Secretary of Labor, as contemplated by Executive Order No. 9017, *supra*, certified the issues to the War Labor Board, stating that collective bargaining had failed, and the Board thereupon took jurisdiction of the dispute. It promptly notified the parties that the existing contract would remain in effect until settlement of the dispute and that any authorized changes would be retroactive to April 1. It scheduled a hearing in the matter for April 24.

The UMWA then announced that the temporary 30-day contract extension was at an end, negotiations with the operators having ceased, and said it no longer considered itself bound to continue the production of coal. Concurrently strikes began in certain bituminous coal mines of the Appalachian Region and by April 26 some 16,000 miners were out. Meanwhile, representatives of both operating groups, but not the union, met with the War Labor Board. After a preliminary hearing, the Board directed that coal production continue under the existing contract, appointed a 3-man panel to start hearings on April 28, and appealed to the UMWA president to halt the work stoppages. However, Mr. Lewis again stated that without a new contract the 450,000 bituminous coal miners would not "trespass" upon coal properties May 1. He also asked the Secretary of Labor to bring about a resumption of direct negotiations with the operators but the Secretary took the position that the War Labor Board should make that decision. The following day the War Labor Board panel

began its hearings. There was still no appearance by the union. Being advised that some 67,000 miners were on strike, the panel recessed in accordance with the Board's established policy that it would not proceed to determine any labor dispute so long as work stoppages continued. Declaring that UMWA had defied its order to halt the strikes, the Board then referred the matter to the President of the United States.

On April 29, 1943, the President sent the following wire to Mr. Lewis and Thomas Kennedy, UMWA secretary-treasurer:

"The controversy between the United Mine Workers of America and the operators of the coal mines has been certified to the National War Labor Board for settlement.

13 "The officials of the United Mine Workers were invited by the Board to recommend a person for appointment to the panel charged with investigating the facts. They ignored the invitation. The Board then appointed Mr. David B. Robertson of the Brotherhood of Locomotive Firemen and Enginemen to represent the employees; Mr. Walter White to represent the operators, and Mr. Morris L. Cooke to represent the public.

"The personnel of this panel assures an impartial investigation of the facts to be used by the Board in its determination of the controversy, in accordance with the law.

"The officials of the United Mine Workers of America have ignored the request of the Board that they present their case to the National War Labor Board panel, and likewise have ignored the request of the Board that the strikers be urged to return to their work. I am advised that many thousands of miners are out on strike and strikes are threatened at many other mines which now are in operation.

"The procedure that has been followed in this case by the Board is, I am assured, in exact accord with that followed in all other controversies of this character.

"In view of the statements made in telegrams to me from some members of the United Mine Workers that OPA price regulations have been disregarded and that the cost of living has gone up disproportionately in mining areas, I have directed OPA to make an immediate investigation of the facts and wherever a violation of the law is disclosed by that investigation, to see that the violators of the law are prosecuted.

"The strikes and stoppages in the coal industry that have occurred and are threatened are in clear violation of the 'no strike' pledge.

"These are not mere strikes against employers of this industry to enforce collective bargaining demands. They are strikes against the United States Government itself.

"These strikes are a direct interference with the prosecution of the war. They challenge the governmental machinery that has been set up for the orderly and peaceful settlement of all labor disputes. They challenge the power of the Government to carry on the war.

"The continuance and spread of these strikes would have the same effect on the course of the war as a crippling defeat in the field.

"The production of coal must continue. Without coal our war industries cannot produce tanks, guns and ammunition for
14 our armed forces. Without these weapons our sailors on the high seas and our armies in the field will be helpless against our enemies.

"I am sure that the men who work in the coal mines whose sons and brothers are in the armed forces, do not want to retard the war effort to which they have contributed so loyally and in which they with all other Americans have so much at stake.

"Not as President—not as Commander-in-Chief—but as the friend of the men who work in the coal mines, I appeal to them to resume work immediately and submit their case to the National War Labor Board for final determination.

"I have confidence in the patriotism of the miners. I am sure that when they realize the effect that stopping work at this time will have upon our boys at the front, they will return to their jobs.

"The enemy will not wait while strikes and stoppages run their course. Therefore, if work at the mines is not resumed by ten o'clock Saturday morning, I shall use all the power vested in me as President and as Commander-in-Chief of the Army and Navy to protect the national interest and to prevent further interference with the successful prosecution of the war."

In the meantime the strikes had continued to spread and by April 30 the production stoppage in the bituminous coal fields was complete. On that day, the UMWA Policy Committee having considered the President's telegram, Mr. Lewis sent him a reply which stated that the union had refused to submit the miners' case to the War Labor Board because the Board was "circumscribed" and concluded by its "Little Steel" formula; that it could not give the miners an equitable decision and would "deny our every request." Citing the "mounting prices of food stuffs and the essentials of life" he said the miners had shattered all coal-producing records and had a right to have their case determined "upon the equities involved rather than by application of a prefixed rule." Mr. Lewis concluded by expressing the view that collective bargaining should be resumed, as follows:

"We want an agreement. We want to work. The bituminous coal operators have willfully blocked the making of an agreement. We respectfully advise that in our judgment the making of an agreement through a renewal of collective bargaining is the logical means of providing justice and equity to all parties."

15 7. Shortly after 10 a. m., May 1, 1943, the President signed the following Executive Order, No. 9340 (8 F. R. 5695):

"Whereas widespread stoppages have occurred in the coal industry and strikes are threatened which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

"Whereas the officers of the United Mine Workers of America have refused to submit to the machinery established for the peaceful settlement of labor disputes in violation of the agreement on the part of labor and industry that there shall be no strikes or lockouts for the duration of the war; and

"Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppages or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work;

"Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, as President of the United States and Commander-in-Chief of the Army and Navy, it is hereby ordered as follows:

"The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

"In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

"The Secretary of the Interior shall make employment available and provide protection to all employees resuming work at such mines and to all persons seeking employment so far as they may

be needed; and upon the request of the Secretary of the
16 Interior, the Secretary of War shall take such action, if any, as he may deem necessary or desirable to provide protection to all such persons and mines.

"The secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"Possession and operation of any mine or mines hereunder shall be terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program."

Upon signing this order the President issued the following public statement:

"On Thursday, April 29, I sent a telegram to John L. Lewis, and Thomas Kennedy, President, and Secretary-Treasurer of the United Mine Workers, pointing out that the coal strikes were a direct interference with the prosecution of the war, and challenged the governmental machinery set up for the orderly and peaceful settlement of labor disputes, and the power of the Government to carry on the war.

"I stated that the continuance and spread of the strikes would have the same effect on the course of the war as a crippling defeat in the war. I appealed to the miners to resume work immediately, and to submit their case to the National War Labor Board for final determination.

"I stated that if work were not resumed by ten o'clock Saturday morning, I should use all the power vested in me as President and Commander-in-Chief to protect the national interest and to prevent further interference with the successful prosecution of the war.

"Except in a few mines the production of coal has virtually ceased. The national interest is in grave peril.

"I have today by appropriate Executive Order directed the Secretary of the Interior, who is the Fuel Administrator and in whose Department is the Bureau of Mines and the Bituminous Coal Division, to take possession of and operate the coal mines, for the United States Government.

17 "I now call upon all miners who may have abandoned their work to return immediately to the mines and work for their government. Their country needs their services as much as

those of the members of the armed forces. I am confident that they do not wish to retard the war effort; that they are as patriotic as any other Americans; and that they will promptly answer this call to perform this essential war service.

"I repeat that an investigation of the cost of living is now being made in the mining areas, and that the Government will insist that the prices be held in accordance with the directions of my recent Executive Order, and violations of the law promptly prosecuted.

"Whenever the miners submit their case to the War Labor Board, it will be determined promptly, fairly, and in accordance with the procedure and law applicable to all labor disputes. If any adjustment of wages is made, it will be made retroactive.

"The production of coal must and shall continue."

Thereafter on the same day the Secretary of the Interior issued an order (8 F. R. 5767) taking possession of all the Nation's bituminous coal mines which produced 50 or more tons per day and all "rail" mines regardless of size, including plaintiff's and some 3,000 others. The order follows:

Order for taking possession

"By virtue of the authority vested in me by the President of the United States, I hereby find from the available information that a strike or stoppage has occurred or is threatened in each of the bituminous coal mines operated by the companies specified in Appendix A attached hereto, and therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

"The President of each company (or its chief Executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation
18 of the mine, and for the distribution and sale of the product thereof.

"All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product

thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"No person shall interfere with the operation of the mine by the United States Government, or the sale or distribution of the product thereof, in accordance with this order.

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

"Possession and operation of any mine may be terminated by the Secretary of the Interior at such time as he should find that such possession and operation are no longer required for the successful prosecution of the war."

8. Also on May 1, 1943, the Secretary of the Interior promulgated Order No. 1807 and Order No. 1808. Order No. 1807 provided for the delegation of the Secretary's power and authority under Executive Order No. 9340 to himself as Administrator, and to the Deputy Administrator, of the Solid Fuels Administration for War created by Executive Order No. 9332 of April 19, 1943. Order No. 1808 provided for appointment of the 11 regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers (hereinafter referred to as "regional managers") of the Solid Fuels Administration for War, setting forth therein their duties and authority, and for other matters as follows:

"By virtue of the authority conferred upon me by Executive Order of the President of the United States, I hereby order and direct:

"1. The eleven managers of the field offices of the Bituminous Coal Division of the Department of the Interior are hereby
19 appointed Regional Bituminous Coal Managers of the Solid Fuels Administration for War, to serve without added compensation. The Regional Bituminous Coal Managers shall use the personnel, records, and facilities of the Bituminous Coal Division in the discharge of their duties under this Order. Each Regional Bituminous Coal Manager shall have jurisdiction coextensive with the territory covered by the field office of the Bituminous Coal Division.

"2. The Regional Bituminous Coal Managers are hereby delegated full powers of supervision and direction of the operation of all coal mines in their territorial jurisdiction during the period in which possession has been taken and continues under the au-

thority of the Executive Order. They shall have authority to advise and to issue directions with respect to the construction of the Executive Order and such administrative orders as may be issued thereunder by me, and, wherever necessary, to issue (except as provided in section 7) specific directions as to the production, sale, and distribution of coal by the mines subject to their supervision, and as to all operating and financial arrangements of such mines. All directions and orders shall be in writing and a copy shall forthwith be mailed to the Solid Fuels Administrator for War. The Regional Bituminous Coal Managers shall be subject to such supervision and direction of the Administrator as may from time to time be prescribed and shall, whenever in their discretion the delay may be practicable, refer questions of general application or major importance to the Administrator for decision. The Administrator will undertake periodically to make and to distribute to each Regional Bituminous Coal Manager a digest of his decisions and rulings and it shall be the duty of the Regional Bituminous Coal Manager and his staff to familiarize himself with and to follow these decisions and rulings.

"3. Each Regional Bituminous Coal Manager shall maintain a current list of the mines subject to his supervision and of the Operating Manager for the United States in charge of each; shall be the officer in immediate charge of each Operating Manager; and shall submit recommendations to the Administrator as to the administration of the general program, correlation between the several regional offices, and as to the reports which may be necessary from the several Operating Managers.

"4. There is hereby created a Regional Advisory Council in each regional office of the Solid Fuels Administration for War, which shall consist of the chairman and the labor representative of each Bituminous Coal District Board in the territory covered by each of the several field offices of the Bituminous Coal Division. The members of the Regional Advisory Councils shall serve without compensation and will be expected to be on duty in the offices of the Regional Bituminous Coal Managers at such times and for such periods as may prove necessary; where there are two or more chairmen of District Boards or two or more labor representatives on any Regional Advisory Council either or both groups may designate one man to serve in the absence of the others of such group.

"5. The members of each Regional Advisory Council shall be freely consulted by the Regional Bituminous Coal Managers, shall be free to offer advice to him and any member may be assigned such executive duties as the Regional Bituminous Coal Manager may prescribe or delegate. Any member of the Regional Ad-

visory Council shall be free to make specific or general suggestion or complaint to the Administrator who will give it his prompt and careful consideration.

"6. The Operating Managers for the United States appointed by me to operate the several mines possession of which has been taken by me, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and directions of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States.

"7. The Secretary of War has stationed one or more liaison officer with each Regional Bituminous Coal Manager, and a liaison officer with the Administrator. Any request for the use of the armed forces of the United States to protect life or property shall be submitted by the Operating Manager in charge of the mine to the Regional Bituminous Coal Manager who shall promptly transmit it with his recommendation and that of the liaison officer to the Administrator for decision as to whether a request for such protection shall be submitted to the Secretary of War pursuant to the provisions of the Executive Order. No Operating Manager and no Regional Bituminous Coal Manager shall have authority to make a request for military protection directly to any officer of the War Department or of the United States Army.

"8. The compliance officers and other employees of the Bituminous Coal Division may be assigned by the Regional Bituminous Coal Managers to inspect the mines subject to their respective jurisdictions and to report upon the operations of the mines, the sale and distribution of bituminous coal and the manner in which the Operating Managers and other officers, mine workers, and employees of the company are discharging the responsibilities and obligations attaching to their service on behalf of the United States."

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However, no control over plaintiff's operations was in fact exercised, except in the particular mentioned in finding 12.

9. On Sunday morning, May 2, 1943, the Secretary of the Interior conferred with the UMWA president and asked that the miners be recalled to work pending a survey of the situation brought about by Government seizure. Mr. Lewis stated he would delay a decision until his meeting with the union's policy committee in New York later that day. At about 9:30 p. m., he announced from New York a 2-week truce in the dispute, beginning Tuesday, May 4, and requested the miners to "cooperate with your government." At 10 p. m. that same night the President of the

United States delivered a radio address in which he reviewed the "serious crisis" facing the Nation. Appealing to the miners to discontinue "the strike against the Government," he said the War Labor Board remained ready to give them a fair and impartial hearing with wage adjustments, if any, retroactive to April 1. The miners began returning to work on Tuesday, May 4, but several days elapsed before operations became normal. With the strike thus abated, plaintiff's men likewise returned to work during this first week of May. Designating one of its own officials to represent the miners' interests, the War Labor Board's 3-man panel then resumed its hearings in the dispute, and Mr. Lewis, after another appeal by Secretary Ickes, announced on May 17 an extension of the truce until May 31, 1943.

On May 25 the War Labor Board rendered its preliminary decision in the bituminous coal dispute (8 War Lab. Rep. 502). It denied the demands for a wage increase, double pay for Sunday work, and a guaranteed work-year of 52 weeks, but approved the union's claim for a $30 increase in the miners' annual vacation payment (from $20 to $50), and also its demand that the operators bear the cost of occupational charges, such as those for lamps furnished the miners, effective April 1, 1943. The Board
22 further stated that the parties should resume negotiations with a view to reaching an agreement on the demands for a guaranteed 6-day work week and portal to portal pay. Resuming negotiations the following day, UMWA offered to withdraw the portal pay claim in favor of a $2 daily rise in wages, later reducing this to $1.50. But the talks again became deadlocked. On May 31, expiration date of the extended truce, the Interior Department instructed the mines to make work available on June 1 regardless of the status of negotiations; however, on that date another general strike started. Thereupon the War Labor Board ordered the cessation of negotiations and for the second time referred the dispute to the President. On June 3, the President issued the following statement:

"Most of the Nation's coal mines are closed because of a general strike which has taken place in defiance of the Government of the United States. I have instructed the Secretary of the Interior, who has possession of the mines for the Government, to proceed to reopen the mines.

"The Secretary of the Interior will continue to operate the mines under the terms and conditions of work which obtained under the old contract which was extended by order of the War Labor Board plus those new terms and conditions which have been approved by the Board and which were announced in the Board's order of May twenty-fifth.

"As President and Commander in Chief, I order and direct the miners who are not now at work in the mines to return to their work on Monday, June 7, 1943. I must remind the miners that they are working for the Government on essential war work and it is their duty no less than that of their sons and brothers in the armed forces to fulfill their war duties.

"Just as soon as the miners return to work, the disposition of the dispute between the miners and the operators will forthwith proceed, under the jurisdiction of the War Labor Board and in accordance with the customary and established procedures governing all cases of this sort."

The UMWA Policy Committee then voted to return the men to work on June 7, and to again extend the truce, this time through June 20. Most of the miners returned on the specified date, though plaintiff's men remained out until June 9.

23 Absenteeism and sporadic strikes continued to prevail in various bituminous coal-mining areas. The contract negotiations, though revived, brought no agreement and it accordingly became necessary under Executive Order 9017, *supra*, for the War Labor Board to finally determine the dispute. On June 18, 1943, after further hearings the Board issued its final order (9 War Lab. Rep.112). It denied the portal pay claim as beyond its jurisdiction, the demand for a guaranteed work week of 6 days, and, in substance, extended the 1941–43 contracts, as modified by its decision of May 25, above-mentioned, until March 31, 1945, unless changed by mutual agreement of the parties. Expressing his disapproval of this development, the UMWA president advised Secretary Ickes that the miners would work for the Government under the decision, but not the operators. Nevertheless on June 21 a third general strike occurred in the Nation's bituminous coal mines. Immediately Mr. Ickes went into conference with union officials, who, on the following day, ordered the men to resume work, under the Government, until midnight October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then. Despite this direction, many of the miners remained idle and plaintiff's men stayed out until July 6. By that date practically all of them were back at work, though production remained well below prestrike levels.

Meanwhile on June 23 the President issued another public statement in which he again condemned the strikes as a deterrent to war production and a violation of labor's no-strike pledge. He further stated:

"The mines for the time being of course will continue to be operated by the Secretary of the Interior under the Executive

Order of May first. The terms and conditions of employment will be those announced by the National War Labor Board in its directive of June 18th. There has been no promise or commitment by the Government to change those terms and conditions in any way."

Upon return of the men to work both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.

24 10. In identical telegrams sent on or about May 1, 1943, the Secretary had called upon each mining company's chief executive officer to indicate his willingness to serve as Operating Manager of its mine for the United States, as follows:

"To assure production of coal necessary to win the war, President of the United States as Commander in Chief of Army and Navy has directed me to take over all bituminous coal mines of above-named company. You are being called upon as a loyal and patriotic American to serve as Operating Manager for the United States of the mines of your company and to continue operations at the mines for the United States. Formal instructions and appointment will issue upon your acknowledgment of this call to service by return wire in substantially following form:

" 'I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees, including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the (insert name of your mine or mines and sign, giving your address.)'

"All officials and employees are directed forthwith to perform their usual functions and duties in connection with mine operation, sale and distribution of product. Pending receipt of formal instructions and appointment, you are authorized and directed to continue operations at the mines for the United States. Fly the flag of the United States on the mining premises. Do all things necessary to assure operation of mines Monday. In operation of mines use existing managerial set-up so far as practicable and take all steps within your power to encourage miners to return to work under present wages and working conditions with understanding that any eventual wage adjustment will be retroactive. If any act transpires requiring maintenance of order by use of military forces, communicate with Regional Bituminous Coal Manager who is manager of field office of the Bituminous Coal Division for area in which mine is located for transmission of request to proper officials. The above-named Regional Manager is available for

further instructions if required. In respect to all ordinary production and distribution problems, proceed, so far as practicable, in accordance with previously prevailing policies.

Set books up so as to keep separate the period of Government operation. Continue personnel organization as nearly as practicable in accord with normal organization. Advise all supervisory employees of the program. Be governed by all applicable state and federal laws consistent with the order pursuant to which you are acting. In respect to any mines which you are reasonably certain will continue in normal, regular operation, you may submit a recommendation that operation of such mine on behalf of the Government be terminated.

"If you are not acting as chief executive officer of the company, this telegram is to be considered as directed to the officer who is so acting."

The telegram so dispatched to the president of the Pewee Coal Co. was received May 1 at plaintiff's Knoxville office in the absence of its president, Frank Garland, and was therefore relayed to B. F. Mason, then superintendent at its mine. After trying unsuccessfully to locate Mr. Garland, Superintendent Mason later that day sent Mr. Ickes a telegram of acceptance in language identical with that suggested by the above-quoted wire. He also raised the American flag at plaintiff's mine and carried out the other instructions contained in the Secretary's telegram.

Later, on May 12, 1943, having received a communication which called his attention to the fact that no undertaking to serve as Operating Manager for the United States had been submitted by him as plaintiff's chief executive, Mr. Garland promptly telegraphed his own acceptance to Mr. Ickes, using the same language. Simultaneously he sent defendant a letter inviting attention to and confirming the superintendent's previous acceptance and also his own undertaking.

Pursuant to their acceptance, Secretary Ickes on or about May 12, 1943, issued to the chief executive officer of each mining company, including plaintiff's president, a certificate of appointment as Operating Manager for the United States. The certificate of appointment thus sent to Mr. Frank Garland, plaintiff's president, reads as follows:

"Whereas, The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:

"(1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.

"(2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

"(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

27 (6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

"(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

"(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules, and regulations issued by the Solid Fuels Administrator for War.

"(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

"(10) The Operating Manager shall, in such operation, distribution, and sale, comply with all applicable Federal and State laws and regulations.

"(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States (name of Company)," but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

"(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

"(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular
28 operation, submit a recommendation that operation of such mines for the Government be terminated.

"(14) This appointment shall be effective immediately."

11. On May 19, 1943, the Secretary of the Interior promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 F. R. 6655), and on July 29 and August 13, 1943, he promulgated amendments thereto, Nos. 1 and 2, respectively (8 F. R. 10712, 11344). Upon issuance these were promptly transmitted to all Operating Managers.

12. On May 5 and 6, 1943, the Solid Fuels Administration furnished placards and posters to mine Operating Managers with instructions that they be put up at various places on mine property and in mining towns, and a supply of booklets was also

furnished with instructions that they be individually distributed to the miners. The placards displayed the American Flag and beneath it the words:

UNITED STATES PROPERTY!

The Secretary of The Interior

Order for Taking Possession

followed by the text of Mr. Ickes' order, quoted in finding 8. Other posters likewise contained the flag, with the following excerpts from the President's May 2 radio address:

The President of the United States on May 2, 1943 said * * *

"I believe now, as I have all my life, in the right of workers to join unions and to protect their unions. I want to make it absolutely clear that this Government is not going to do anything now to weaken those rights in the coal field. * * *

"I believe that the coal miners themselves as Americans will not fail to heed the clear call to duty. Like all other good Americans, they will march shoulder to shoulder with their armed forces to victory."

The booklets bore the title: "A Message to the Nation from President Franklin D. Roosevelt" and included the full text of said radio address plus extracts from Executive Order 9340. Plaintiff posted and/or distributed these documents.

As part of their contention that living costs had risen disproportionately to wages, the miners had alleged that com-
29 pany stores were disregarding OPA maximum price regulations. Accordingly on May 3, the Secretary directed that mine stores comply with such regulations, and shortly thereafter he conducted a survey of company stores and commissaries to determine their costs and selling prices, requesting the mines to furnish certain information therefor. Plaintiff did so, and advised defendant, in addition, that it would "carefully follow" the May 3 directive. About 2 months later Mr. Ickes, in conjunction with his campaign to reduce accidents in the coal fields, also instructed the mines to operate in full compliance with State and Federal safety laws and regulations.

The Wage Agreement (finding 4) included a provision for an annual vacation to be taken by the miners during late June and early July, stipulating that men who qualified by having 12 months' continuous employment should receive $20 as vacation "compensation." It also included provisions requiring that the miners pay, among other charges, a rental fee for electric caplamps they used in the mines. As heretofore noted the War Labor Board's May 25, 1943, decision modified these provisions by author-

izing a vacation payment of $50 and the refund, retroactively to April 1, 1943, of occupational charges like rentals on mine lamps. On June 7, 1943, concurrently with the miners' return to work after their second general strike, the Solid Fuels Administration instructed Operating Managers to carry the Board's decision into effect, and stated that in all other respects the terms and conditions of employment would be those obtaining under the old contract, as they were throughout the balance of the Government control period. On or about June 30, 1943, plaintiff made the payments, incurring a cost of $1,890 over what the unmodified contract would have required for vacation compensation and $351.26 for lamp-rental refunds.

13. On several occasions Secretary Ickes and his assistants were in touch with the mines in the interest of attaining maximum coal production to meet the Nation's war needs, and also to secure coal production data which they required for various purposes, as hereinafter indicated.

On May 3, 1943, the Secretary directed that all mines operate on the 6-day week, stating that the Office of Price Administration had recently granted coal price increases to cover such operation and that he intended recommending rescission thereof as to any mine that failed to comply. This telegram is as follows:

"To assure maximum production of coal so that war program will not be impeded you are hereby directed to maintain operations of mines under your charge on six days a week. Since maximum prices have been recently increased by Office of Price Administration to permit operation of mines on a six-day week work basis, you are to afford miners an opportunity to work six days each week and are to operate mines under your charge on that basis and to pay time and one-half or rate and one-half for sixth day of work as heretofore agreed upon by collective bargaining and previously cleared by War Labor Board. The Government is relying on you and all mine employees to exercise utmost effort in maintaining and increasing production of coal so vital to the winning of the war. If for any justifiable physical or operating reason six-day week basis is not feasible, timely application for exemption from this directive may be made together with full supporting statement of underlying reasons. I intend to recommend to the Office of Price Administration that the increase in maximum prices for six-day week operation be rescinded as to any mine which fails to comply with this directive."

The Wage Agreement as amended February 11, 1943, had authorized the 6-day week in the industry and most of the mines

were already operating on that schedule. To increase its production the Pewee mine had operated a 6-day week beginning in the summer of 1941, using a system whereby its men, then more than adequate in number, were "floated" or worked irregularly over the 6-day period, but individually their time did not exceed the basic 35-hour 5-day week. This enabled plaintiff to reduce week-end absenteeism, work a 6-day week with full crews, and yet pay no overtime. The aforesaid amendment retained the basic 5-day week with the requirement that it begin each Monday and provided that the men were to be paid at the overtime rate if they worked the 6th day, or Saturday. Following its adoption plaintiff had to discontinue the practice of "floating" men and
31 offer them work on a straight 5- or 6-day basis. It elected to incur the extra cost of the 6-day schedule beginning February 22, 1943, so as to avoid the production loss entailed in a shorter week. There is evidence that the plan did not measure up to plaintiff's tonnage hopes due to week-end crew shortages caused by the habitual absenteeism of some of its miners. By then, also, the number of its better workers had been reduced because of the wartime competition for labor. The management on March 6, 1943, was examining the possibility of discontinuing the 6-day week at its mine. Nevertheless plaintiff remained on the 6-day schedule. On two occasions during May 1943 it informed the Solid Fuels Administration, with reference to Secretary Ickes' communication, that it intended to continue on that basis "unless conditions beyond our control, such as car shortage, etc., make this impossible."

The amended Wage Agreement, in addition, had authorized holiday work in the mines, if consented to by the parties locally. Such work was to be paid for at the overtime rate without, however, interfering with payment of that rate for Saturday work in the same week. Defendant's coal agencies asked the mines to maintain operations on 3 holidays during the involved period but plaintiff could not have been affected except by the last of these requests, involving Labor Day, and the proof does not reveal whether or not its men worked on that day. Prior to Government control the Solid Fuels Administration, in connection with its supply and distribution functions under Executive Order 9332 had asked each bituminous producer to file a weekly card report of its production and running time. On May 12, 1943, the mines were sent a form memorandum in regard to sending in promptly the weekly reports called for by memorandum of May 10, 1943, from Mr. Gray, Deputy Solids Fuels Administrator for War. Attention was called to the importance of furnishing this data in keeping the Administration informed as to the availability of bituminous coal

for war needs. The memorandum concluded with the following sentence: "Our Compliance Officers in all Districts are being instructed to make a check to determine if these reports are being forwarded."

32 For the purpose of supplying information regarding work stoppages by the miners, their causes, and their effect on the production of coal, Operating Managers were instructed to report daily, begining May 17, 1943, the number of men working the previous day, the number normally employed, the production for that day, and the normal daily production giving the reasons for any marked decrease therein or for any shutdown of the mine. In plaintiff's area the collection of this information was handled by the defendant's local representative who obtained it in telephone contacts with the several mines and then transmitted the results to the Regional Solid Fuels Manager. These telephone calls were made at the expense of the operating companies, but in plaintiff's case they involved a cost of approximately 60 cents per day, because of the proximity of its mine to the points to or from which they were made. The need for such reports having ceased, the instruction relative thereto was rescinded September 3, 1943.

14. On August 16 the Coal Mines Administration communicated with the Operating Managers with reference to the requirement of the War Labor Disputes Act, instructing them to furnish information upon which the Secretary could make a determination as to the release of their mines, namely, coal production figures for each week since April 1, 1943, any explanation necessary to a reliable comparison thereof, and their opinion, supported by the facts, as to whether productive efficiency had been restored to the level prevailing before Government control. As a result of the information obtained, Mr. Ickes terminated control of 58 bituminous mines on August 20 and 23, and ended it for some 370 others on September 4. Thereafter, he promulgated an omnibus order dated October 12, 1943, which terminated Government control of the Pewee mine and all others not previously released "in accordance with the provisions of the War Labor Disputes Act," as follows:

"On the basis of available information and evidence, and after consideration of all the circumstances, and in accordance with the provisions of the War Labor Disputes Act of June 25, 1943

33 (Pub. No. 89, 78th Cong., 1st Sess.), I find that the possession and control by the Government of any and all of the coal mines now in the possession of the Government should be terminated.

"Accordingly, I order and direct that possession and control by the Government of any and all mines now in the possession of the Government, including any and all real and personal property, franchises, rights, facilities, funds, and other

assets used in connection with the operation of such mines and the distribution and sale of their products, be, and they are hereby, terminated and that there be conspicuously displayed at the mining properties of each of such mines copies of a poster to be supplie by the Coal Mines Administration and reading as follows:

"NOTICE

"Government possession and control of the coal mines of this mining company have been terminated by order of the Secretary of the Interior.

"Provided, however, That nothing contained herein shall be deemed to preclude the Administrator from requiring the submission of information relating to operations during the period of Government possession and control as provided in Section 40 of the Regulations for the Operation of Coal Mines under Government control, as amended (8 F. R. 6655, 10712, 11344), for the purpose of ascertaining the existence and amount of any claims against the United States so that administration of the provisions of Executive Order No. 9340 (8 F. R. 5695) may be concluded in an orderly manner; and Provided further, That except as otherwise ordered, the appointments of the Operating Managers for the mines affected by this order shall continue in effect."

By letter of October 13, 1943, the Director of Production, Coal Mines Administration, transmitted to the plaintiff a copy of the foregoing order terminating control and possession of the plaintiff's property to the extent stated therein. This letter also referred to Instrument Nos. 1 and 2 provided under Section 40 of the Regulations for the Operation of Coal Mines under Government Control and advised the plaintiff that "Failure to execute such an instrument may prevent your full discharge as
34 Operating Manager and may require a comprehensive accounting of the Company's books and records for the period of Government possession and control."

Between May 1 and July 6, 1943, when the last work stoppage ended, plaintiff lost production because of strikes, its men being out 25 working days in all—5 of them in May, 16 in June, and 4 in July. Mr. Garland, plaintiff's president, wrote Secretary Ickes on August 6, 1943, in reference to the latter's July 29 mine-release instructions, as follows:

"* * * you request that each operating manager advise you concerning the termination of Government possession and I am writing to say that in my opinion the Government should continue active control of the mines if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a

new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies."

In response thereto the Administration advised Mr. Garland that the mines were under Government control to assure the production of coal and their release would be governed by the provisions of the War Labor Disputes Act. It again communicated with him on September 18 to ask that immediate attention be given the August 16 instruction that mine managers supply Mr. Ickes with data that would enable him "to take action * * * with respect to relinquishing Government possession" of the mines, with which Mr. Garland had not complied. Plaintiff acknowledged this request September 24, and its president, on October 4, sent forward the tonnage figures, with his opinion that

"* * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc."

The figures sent by plaintiff evidencing the daily average production are as follows:

35 *Daily average production, Pewee Coal Company, Garland, Tennessee, for each week April 1 through Sept. 29*

[Week figured from Thursday through Wednesday since April 1st was Thursday]

	Cars		Cars
Apr. 1–7	9	July 1–7	2
Apri. 8–14	7	July 8–14	4
Apr. 15–21	11	July 15–21	5
Apr. 22–28	6	July 22–28	5
Apr. 29–May 5	5	July 29–Aug. 4	5
May 6–12	7	Aug. 5–11	2
May 13–18	5	Aug. 12–18	3
May 20–26	4	Aug. 19–25	3
May 27–June 2	4	Aug. 26–Sept. 1	2
June 3–9	1	Sept. 2–8	3
June 10–16	5	Sept. 9–15	4
June 17–23	3	Sept. 16–22	5
June 24–30	0	Sept. 23–29	4

Cars estimated at 50-ton capacity.

In accordance with Section 40 of the amended coal mines regulations and the Secretary's mine-release order, the Coal Mines Administration upon termination of Government control undertook to ascertain the existence and amount of any claims against the defendant. Since plaintiff's president had previously indicated that he considered Pewee's operations were being conducted for the Government's account, the Administration on October 25, 1943, advised Mr. Garland that he should furnish evidence of any

"costs incurred and payments made allegedly as a result of Government possession and control" together with specified accounting data covering the company's operation during the period thereof.

Under date of November 30, 1943, plaintiff wrote the defendant's Deputy Coal Mines Administrator, as follows:

"In conformity with your request under date of October 25, we are sending you herewith the data required in connection with our claim for loss sustained during the period of Government operation, May 1, 1943, to September 30, 1943, amounting to $42,539.23.

"Under item 1 for statement of costs, etc., resulting from specific directions, we are sending you marked 'Exhibit 1-A' a
36 statement of the $50.00 vacation payments listing check number, amount, etc., this totalling $3,150.00. Under our contract we were to pay $20.00, therefore, the actual loss in excess of our agreement was $30.00 of the $50.00 paid each employee, total $1,890.00.

"'Exhibit 1-B'—A list of refund on mine lamp collections, April and May 1943, total $394.02.

"'Exhibit 1-C'—A list of the fines which should have been assessed and collected due to our miners being on strike, this totals $2,106.00.

"'Exhibit 1-D'—Invoice from Timmons Audit Company, Knoxville, Tennessee, for $125.00 covering expense in connection with the certified statements required by you in the above referred to letter. These four items total $4,515.02 and are submitted as direct losses on account of specific directions.

"Item #2—Our position is as advised your department from time to time during the period of Government control that we were operating this property for the account of the Government and that we are due the total loss of $42,539.23. This, of course, embraces the other items listed in connection with item #1 above except the $125.00 accounting expense.

"Item #3 and #4—Herewith the requested balance sheet and statement of profit and loss made by certified public accountants.

"Item #5, 6, 7, and 8—As it will be noted there are no abnormal changes in assets, investments, etc., nor any charge whatsoever for bad debts or reserves therefor. The depreciation, depletion, etc., reflect a constant figure and differ from the previous year only on account of equipment or additions to plant, etc. There are no affiliated companies, hence, nothing to report with reference to accounts due, etc.

"Item #9—The comparative tonnage production summary is attached and should be compared with only 1942 as this mine was put into production in 1941 and did not reach anything like normal production until the late fall of that year.

"In line with your direction, we have executed as President of this company the affidavit requested from an officer of the company, specifying on the face thereof 'see attached,' and the attachments are made a part of the affidavit.

"Since we are in immediate need of funds, we ask that you approve our claim promptly and we shall appreciate advice from you as to about how long it will be necessary for us to await remittance covering."

37 In response to said letter the Deputy Coal Mines Administrator, under date of December 14, 1943, wrote plaintiff as follows:

"Receipt is acknowledged of your letter of November 30, 1943, transmitted by Ansell, Ansell and Marshall, Attorneys at Law, enclosing herewith various data compiled by Timmons Audit Company, Public Accountants and Auditors, of Knoxville, Tennessee, in support of your claim for loss alleged to have been sustained during the period of Government operation of your mine from May 1 to September 30, 1943, however, you have failed to fully supply the information requested in our letter of October 25.

"It is noted that the period the Auditor used for compiling the results from operations was April 30 to September 30, 1943, whereas the period of Government possession and control of your mine extended from May 1 through October 12, 1943, and data should be prepared for that period.

"Your attention is called to the next to the last paragaph of our letter of October 25, wherein we granted permission to prorate the expenditures for the odd periods for the previous two years on an equitable basis so long as the basis used is a reasonable one. However, the basis used should be set forth in detail in the Auditor's report.

"With respect to the last paragraph of your letter. I regret to inform you that this office cannot make any funds available to your company. Any claim it may have against the Government would have to be prosecuted in accordance with the applicable Federal statutes and regulations concerning claims against the United States. The data we have asked you to file is being compiled with a view to furnishing the appropriate agency with full information as to the claim your company is reserving, should it elect to prosecute that claim. The compilation of this data is not intended to indicate that this office in any way approves the claim reserved."

The plaintiff's compliance with the defendant's instruction letter of October 25, 1943, asking that it submit a comparative balance sheet and a comparative profit-and-loss statement certified

by an independent public accountant required it to expend $125 for the employment of such accountant.

38 15. Besides the production loss due to strikes, as previously noted, the tonnage from plaintiff's mine, the so-called Pewee No. 1, was seriously diminished subsequent to May 1, 1943, by underground physical conditions. A drift mine, driven into a mountainside at an elevation paralleling the coal seam, it was constructed beginning in the summer of 1940, first produced coal in early 1941, and was in continuous production thereafter. The mine's main entry was driven nearly the entire distance through a spur on the southeast side of plaintiff's leasehold, and as projected—but not driven—into the principal body of plaintiff's coal situated beyond the spur. The main entry consisted of 3 separate "headings" or openings, the central of which was the main passageway that provided the means of access to all underground operations from the outside. The other 2 headings were air courses, required for ventilation of the mine. From the main passage, side entries were driven into the spur, at intervals, in order to fully mine that particular area as the development was progressing through it preliminary to reaching the chief coal deposit. These lateral entries were identified by number and their location on the main entry's north or south flank. Most of the coal was actually obtained from large individual openings 250 to 300 feet deep and 50 to 75 feet wide, known as "rooms," and driven, in succession, at right-angles to and off both sides of the lateral entries. Coal-bearing pillars and walls were necessarily left between these rooms and other mined-out places to support the weight of the land-mass or mountain top above the mine, and safe mining practice required that their strength be adequate for that purpose.

In the latter part of 1941, less than a year after Pewee No. 1 went into production, plaintiff commenced using an unconventional or unusual method of working its rooms "on the advance," that is, immediately upon turning a lateral entry it drove and mined the rooms while also advancing the entry, instead of first driving and developing the entry to its full projected length and then working the rooms from that point back, or "on the retreat," toward the main entry, which is the usual method. Plaintiff likewise started taking excessive amounts of coal from certain of the pillars and room walls, thus weakening the supports

39 and setting in motion a gradual shifting of the mountain top above the mine. This movement, or "squeeze," finally manifested itself in May 1943 over the mine's third north entry. Around the end of that month the entry's roof began collapsing at points adjacent to rooms which had already been mined. Since

3rd North was being worked "on the advance" these rooms were closer to the main entry than others which were then being mined and the condition not only threatened to block plaintiff's access to them but also to considerable more distant coal-bearing territory which had not yet been reached. Measures were accordingly taken during June in an effort to keep 3rd North open but that became increasingly difficult and by early July the entry and its coal had to be abandoned. Plaintiff had pursued these mining practices with the object of producing a greater and quicker volume of tonnage which, if not profitable, would at least lessen its costs while the work was progressing through the spur and into the principal body of its coal, where greater territory would be available for development.

In July 1943 the mine's main entry was driven into the initial stages of a "fault" or low-coal area. From a normal 38 inches the coal began gradually declining in thickness as the entry was advanced. The superintendent in charge of the mine, Arnold McNealy, thought the condition might become serious and, at a conference between the mine supervisory personnel and plaintiff's president, he so advised the latter. At or about this same time Mr. Garland first wrote the defendant with a view to obtaining financial aid in operating plaintiff's mine. His letter to the Solid Fuels Administration, dated July 22, 1943, was as follows:

"From the enclosed reports you will note that our Company operated during May and June under Government ownership at a loss of $20,815.95. This was occasioned in part by the sporadic strikes, our mine continuing idle until the seventh of the current month and tonnage has been especially low since that date, and also by reason of the substantial vacation payments.

"In order to meet our maturing payments including pay roll it becomes necessary for us to call on you for the loss sustained, and since we do not have sufficient funds in hand to meet our June bills, pay roll due July 31st, Social Security, Victory Tax, Old Age Benefits, and 20% Withholding Tax, we ask that you send us a voucher by air mail.

"P. S. Most of the industrial coal from this operation is being shipped the Tennessee Valley Authority for generating power, a substantial part of which goes to the Aluminum Company, so you will note the urgent necessity of keeping this mine in production."

By follow-up communications dated July 27 and 28, plaintiff's president urged "quick handling" of this matter. On July 31 the Administration's Director of Production wrote Mr. Garland:

"I regret to inform you that this office is unable to afford your company any financial assistance. The mining company, through

its duly authorized officials, and in accordance with applicable company procedures and pertinent laws, should utilize and draw upon any funds, accounts, or properties due or belonging to the company for the purpose of meeting financial obligation. In the event that such funds, properties, or accounts are insufficient, customary sources of credits or funds should be utilized.

"No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority express or implied, to bind or impose liability on the United States or any of its officials or agents in the absence of specific direction or order by the Administrator to that effect. Nor shall any operations of any mine property in possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as specific written direction or order to that effect be given by the Administrator. Accordingly, all losses or deficits incurred during the period of Government possession are, as heretofore, for the account of your company and to be borne by it."

16. In bituminous coal mining a "fault" is an area where the coal has been displaced by geological pressure on the seam, and consequently its normal thickness has been materially lowered. It is not uncommon to experience faults while mining coal. Many of the faults in the Pewee mine were "local," that is, the coal seam becoming thin for only a short distance and then resuming
41 average thickness. Howevef, faults occasionally were extensive. Faults might appear abruptly or gradually. Faults necessarily involve a greater mining cost, measured by the thickness and extent of the coal displaced because of the increased quantities of rock (and not coal), that must be removed. However, most of the faults encountered in the Pewee mine during Government possession were local, were not unusual and were generally compensated for by the fact that the coal, being of high grade, sold for a higher price with good production.

Superintendent Mason, who began his period of employment at the mine in August 1941 and left about May 1943, had mined through at least one local fault and low coal during the month of May 1943. Superintendent McNealy, who came in as superintendent in July 1943, discovered 3 or 4 weeks after he had commenced work in the main entry, an extensive and serious fault. The coal began to get smaller, and unfavorable conditions obtained in the Pewee mine. After a futile effort to mine through this serious fault in the main entry, Mr. McNealy recommended that work in the mine be stopped due to the high cost of operation.

This recommendation was concurred in by Mr. J. M. Patteson, an Industrial Engineer, who was employed by plaintiff for a period from August 1943 to April 1945, and who was also, for a time, superintendent of Pewee No. 1.

Since the mine's existence depended upon advancing the main entry—its life line—this recommendation, if adopted, would have left but one alternative—to retreat from and close out the entire mine operation. This was opposed by T. J. Musick, a foreman, who theretofore, for a time, had been in charge. He maintained that the low-coal area would soon be gotten through, and plaintiff's president agreed with him.

Accordingly, mining operations were continued while Mr. Garland, during the latter part of July 1943, consulted plaintiff's vice president, W. E. Davis of Lexington, Kentucky, whose particular function was to advise with him on technical mining matters. Mr. Davis was president of various coal mining companies in that general section, as well as plaintiff's vice president and a stockholder of plaintiff including the year 1943. Mr. Davis
42 visited the mine during the latter part of July or early part of August 1943. During his visit operations were being conducted in the main head entry above the 5th South; also some work was being performed in the left South and also the 5th South. Some work was also being performed in the 4th North, and some coal was being taken from 3rd South and 5th South. The coal was down to about 18 to 20 inches in the main heading. Observations indicated that the coal through which work had proceeded up to this point, had varied in thickness; some of it had been 34 to 35 inches thick, and that no work was being performed in the 2nd and 3rd North on account of crumbling of the pillars of the mine. This crumbling prevented continued operations in taking coal in that area, this being due to the squeeze resulting from plaintiff's taking coal from pillars, and failing to leave enough to keep the top from falling in. Plaintiff's operators had taken large amounts of tonnage from 3rd and 4th North, which caused the drop of pillars at those points, and had left a lot of coal which could not be mined. (Finding 15.)

After his visit to the mine Mr. Davis and Mr. Garland held a conference regarding the situation. Owing to the physical conditions in the mine, which they deemed unfavorable, and losses being sustained, they agreed that a drastic change in policy would be advisable. They also considered the advisability of going into the Red Ash mine which plaintiff also owned.

Mr. B. R. Stout, mining engineer for the Coal Creek Mining and Manufacturing Company, plaintiff's lessor, inspected plain-

tiff's Pewee No. 1 mine three times during 1943. Mr. Stout ascertained on his visit to the mine July 8, 1943, that plaintiff had just encountered what later proved to be a serious fault, but on that date it was not definitely known to be a fault. The coal lowered in thickness for about 10 feet and then became materially thicker again, which situation is not unusual in a mine. Such a situation was noted on Mr. Stout's visit. On or about August 10, 1943, Mr. Stout returned to the mine and made another inspection, during which he found that the fault had developed into a serious one. This visit was made at the request of Mr. Garland, plaintiff's president, who advised Stout that they
43 had encountered a fault which looked bad. Thereafter Mr. Garland and Mr. Stout had frequent conferences regarding the general situation. Mr. Stout advised Mr. Garland and Mr. McNealy to go on through or try to find a way around the fault. Again on September 22, 1943, Mr. Stout visited the mine and was told that they could not find a way around the fault. Again on September 22, 1943, Mr. Stout visited the mine and was told that they could not find a way around the fault, though the mine was on that date still operating, mining coal and also endeavoring to find a way through or around the fault. The work in the mine was subsequently discontinued with permission of the lessor, on or about January 1944, and retreat operations were carried on after that date.

Mr. Stout, as manager of Coal Creek Mining and Manufacturing Company, lessor, under date of August 27, 1942, had written Mr. Garland a letter regarding conditions in this mine, reading, in part, as follows:

"Room No. 1 drive off L South Main (driven toward crop) should never have been driven. In fact a solid block to room No. 2 is little enough coal to have left as a safety block to protect your Main. The safety block, on the right side of the Main, is only the thickness of a room. The work has been 'projected' between Nos. 1 and 2 North, but a room has been worked inside the pillar projected to be left. I am sorry to say it, but the map actually looks like a map of a little truck mine. You have more territory and will probably be working longer than Clinchmore, but in no place have they touched a ton of coal within 200 feet of either their Main or Airway. 'Hoggin' coal, especially near a Main that has to live for 30 or 40 years, is very, very poor practice, and can be extremely expensive.

"I realize there is a great temptation on the part of every one connected with a mine to show a big profit this month, and this year, but a mine is a long-time proposition, and it is often far better

to make very little profit or barely break even for the first few years, and get your mine development ahead, and your entries properly protected. Clinchmore has had the most satisfactory system, and I am sure has showed up a larger profit to them over the years, and that is to drive their working entries up, then start room work from the back and 'leave all their troubles behind them,' robbing the entry as they finish with the rooms. The coal cost is slightly higher while you so develop an entry, but you get your investment back with compound interest, and above the legal rate too, when you work the entry."

44 17. Included in plaintiff's leasehold, and situated at approximately 100 feet lower level than the Pewee coal seam, was another seam known as Red Ash. Red Ash coal was inferior to Pewee in quality and hence brought a lesser price on the market. A separate agreement between plaintiff and the Coal Creek Mining and Manufacturing Company, signed in connection with the latter's participation in the financing of the railroad extension serving plaintiff's property, required that it either develop Red Ash within 6 years after the agreement or pay a royalty to retain the mining rights thereto. In view of the decreased yield of the Pewee mine, it was decided to open the Red Ash mine at once. This was done in August 1943.

On August 3, 1943, while plans for the above projects were being formulated, Mr. Garland again wrote the defendant in a further effort to obtain its financial aid for plaintiff's operations, as follows:

"It may be that the Government has confiscatory powers which would warrant them in seizing a citizen's property, appointing a manager of their own selection, issuing orders to him as to how he should conduct the operation of the property and then forcing the property owner to absorb any loss attendant upon this handling. However, I cannot believe that here in the United States our Government will go to this extreme. Consequently, I am taking the liberty of sending copy of our correspondence to Senator Stewart and Congressman Jennings of this State.

"The above has to do with your letter of July 31, and I want to refer to the second paragraph thereof and ask your advice as to what procedure is to be followed after all the 'customary sources of credits or funds' have been exhausted. In this particular case I personally arranged for the money to meet the pay roll for the July first half period, and this company being a relatively new mine is heavily in debt for equipment purchased and cannot secure additional funds. It is my understanding that you have advanced other operations money for meeting pay rolls and I would

like definite advice from you concerning this and if so the reason for refusing our request.

"From the last paragraph of your letter I take it that the Administrator may issue specific instructions to impose certain
45 liabilities on the United States and if this is the case, I ask that you review this matter and place our request before the Administrator asking that he issue an order covering our situation.

Two days later, on August 5, plaintiff's president presided over a meeting of its Board of Directors at which resolutions were adopted (1) authorizing the corporate officers to "effect loans, advances, or other forms of credit at any time or times" from the company's principal bank, and (2) recommending a $50,000 increase in the corporation's authorized capital stock. On August 19 the stockholders unanimously approved these resolutions, and shortly thereafter approximately $30,000 of the additional stock was purchased. These funds were used for current operating expense of the Pewee No. 1 mine, to reduce bank loans covering equipment purchases, and to defray the cost of the first of the Red Ash mines, construction of which began later that month.

Not having previously consulted the East Tennessee Iron & Coal Co., one of the lessors, about the fault, he directed the following letter, dated September 7, 1943, to it:

"As you know, our main heading has gotten into some very low coal with sandstone top which is very difficult to drill and shoot and as a consequence thereof our tonnage has dropped to a very small figure.

"For the last several weeks we have been driving ahead both on our main and in four north where likewise we are in low coal with this sandstone roll for top, hoping that conditions would improve but we have decided to open the red ash seam and are building a tram road around to the right facing the incline and will hoist the red ash coal to the Pewee level. The particular problem we want to discuss with you is whether we shall continue driving the main heading of Pewee until we are through the fault or discontinue operations in that seam as our red ash tonnage increases or extend the tram road 4,000 to 5,000 feet around the mountain to a point at the head of the left fork of Mangrave Branch where our outcrop shows forty inches of clean Pewee coal with no evidence of sandstone roof and extract the Pewee from that mine opening.

"Information reaches us that you are doing some core drilling in an area contiguous to our lease and at your entire convenience we would like to talk with you about core drilling ahead of
46 our main entry in an endeavor to establish the confines of the sandstone roll as it would be much more profitable to

you as well as ourselves to continue our main heading if a few hundred feet put us through this fault rather than spending a substantial amount of money on an outside tram road."
The meeting therein proposed was not held until January 11, 1944 (Finding 19).

Under date of September 15, 1943, plaintiff's president applied to the Smaller War Plants Corporation of the United States Government for a loan of $25,000, and tendered as collateral therefor certain of the company's buildings and all of its coal cutting and loading machines, which he valued at $65,276.80. Two days later, in answer to a communication from it, Mr. Garland wrote the Coal Mines Administration:

"* * * this will reiterate my advice that we are operating this mine for the account of the United States Government and if you will advise the form in which we are to submit the statement of the amount they are due us and other data required so that we may settle this account, we shall be pleased to fill it out promptly and arrange to take this mine back over for private operation as soon as our account has been settled."

18. On September 24, 1943, the Deputy Coal Mines Administrator, Carl E. Newton, responded to plaintiff's August 3 letter, set forth hereinbefore, as follows:

* * * * *

"To date the Coal Mines Administration has not advanced funds to any coal mining company. In my address to the American Mining Congress at Cincinnati, Ohio, delivered on July 20, 1943, and broadcast over the Mutual Broadcasting System, I specifically stated that the Coal Mines Administration has not and does not intend to advance money to coal mining companies. I am enclosing a copy of this address for your information.

"I assume that you have now received a copy of Amendments Nos. 1 and 2 to the Regulations for the Operation of Coal Mines under Government Control which provide a procedure for mining companies to assert claims for liability against the Government, directly resulting from any specific direction or order. With respect to your inquiry concerning the procedure to be followed to obtain funds after all customary sources of credits or funds have been exhausted, you are advised that, as stated in Mr.
47 Thomas' letter to you of July 31, 1943, operation of your company's mining property is for the sole account of your company and not for the account of the Government. Accordingly, the matter of obtaining funds with which to operate is one to be handled by your company through its duly authorized officials and in accordance with applicable company policies and pertinent laws.

"With regard to your request that the Administrator issue an order covering your situation, I regret to inform you that, on the basis of all the facts and circumstances presented, such request must be denied."

Plaintiff's president thereupon made the following further appeal for the defendant's financial assistance by letter to the Deputy Administrator dated September 28:

"You may be assured that I appreciate your comprehensive letter under date of September 24th and the more comprehensive information contained in the excellent address delivered by you in Cincinnati on July 20, and I regret I could not get away to attend the American Mining Congress this year.

"Being handicapped by not having had legal training, we find it difficult at times to follow directives, orders, etc., of the Government which I know must conform to all existing statutes, regulations governing procedure, etc. In view of this I would like to submit our position with reference to our operation of the Pewee Coal Company Mine when it was taken over by the Government. At that time we were seriously debating discontinuing operation due to the labor situation, unfavorable operating conditions, etc., but felt that we had no choice in the matter when the Government took over and directed that we carry on. We assumed, as indicated previously, that we were operating for the account of the Government. Certainly, we would have discontinued producing Pewee coal and refused to pay the so-called increased vacation payments, etc., which amounted to several thousand dollars if we had been operating 'on our own.' In view of your position we are instructing our operating department to discontinue all advance work at this mine recovering what little tonnage they can and it will be out of production in the next several weeks.

"Our total loss under Government operation amounts to between $30,000 and $35,000. It is sincerely hoped that it will not be necessary for us to engage an attorney to handle our claim and feel that this will not be necessary if you will advise us with reference to our position as stated hereinbefore and send us the proper papers for filing our claim."

48 In reply thereto the Deputy Administrator, on October 7, wrote Mr. Garland, in part:

"Section 17 of the Regulations for the Operation of Coal Mines under Government Control provides, in part as follows:

"'No operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific

direction or order by the Administrator to that effect. Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator.'

"These regulations plainly contemplate that, in the absence of a contrary direction by the Administrator, where the management has deemed it advisable for sound operating reasons to abandon operations at any particular mine, it may do so. Indeed, a number of mines have been shut down during the period of Government possession, where, in the exercise of their prudent business judgment, the mine owners decided that cessation of operations was necessary."

19. Plaintiff carried on in the 4th North and 5th South entries with work of the character previously described, and in November it also resumed driving the main entry. Since the coal's thickness showed no improvement, Superintendent Patteson again stopped the "main" about November 20. On January 11, 1944, Mr. Garland met with representatives of both lessors and informed them that the mine had been "temporarily" abandoned because of the fault. In a discussion as to plaintiff's future plans, East Tennessee suggested that a few diamond-core drillings be made, or that a narrow test entry be driven through the fault, with which Mr. Garland was inclined to agree, but Coal Creek was not, it having become convinced by then that plaintiff had made due effort to overcome the fault and that further attempts would prove equally unsuccessful. It accordingly granted its permission to withdraw.

49 Plaintiff thereupon commenced retreat operations, withdrawing from Pewee No. 1 and removing from the pillars and other places the coal that could not be mined as long as there was any expectation of the operation advancing. This "robbing" is the usual practice when retreating from a mine. It was completed in the late Spring of 1944, and Pewee No. 1 was then abandoned. It has since caved in. The first Red Ash mine, which had gone into production about the middle of November 1943, was likewise unsuccessful. It was abandoned in early 1944. Plaintiff then undertook the project of extending the outside tram road 3,500 feet around the mountain, as hereinbefore mentioned, and developed a new Pewee mine at that point, which is the present operation.

20. During the period April 1, 1942, to March 31, 1944, the

plaintiff produced coal through its mining operations at Garland in the following volume, and with the following total realization, total cost, and net profit or loss:

Period	Total tons produced	Total realization	Total cost	Total net profit or loss [1]	Per ton profit or loss [1]
1942					
April	13,072.70	$39,442.58	$36,135.46	$3,307.12	$0.26
May	12,045.15	36,708.76	36,985.60	276.84(L)	.02(L)
June	11,354.95	34,235.74	36,991.60	2,755.86(L)	.24(L)
July	10,767.10	32,533.76	28,986.25	3,547.51	.33
August	9,455.55	28,909.59	30,724.04	1,724.45(L)	.18(L)
September	9,928.45	30,320.53	31,154.67	834.14(L)	.08(L)
October	13,397.35	41,640.51	35,868.84	5,771.67	.43
November	10,982.10	34,667.73	32,316.81	2,350.92	.22
December	11,401.20	35,983.38	35,434.98	548.40	.05
1943					
January	11,339.65	35,517.96	38,682.40	3,164.44(L)	.22(L)
February	9,879.45	32,806.06	33,976.86	1,170.80(L)	.12(L)
March	10,177.05	34,611.09	44,149.83	9,538.74(L)	.94(L)
Total, fiscal year	133,800.70	417,476.69	421,407.34	3,939.65(L)	.03(L)
1943					
April	11,217.85	38,320.65	37,090.03	1,230.62	.11
May	7,158.50	24,800.54	31,744.35	6,943.81(L)	1.04(L)
June	2,771.00	9,473.54	16,251.83	6,778.29(L)	2.44(L)
July	5,852.85	19,876.69	26,659.28	6,782.59(L)	1.15(L)
August	3,721.70	12,965.05	24,211.28	11,246.23(L)	3.03(L)
September	5,421.45	18,924.71	21,478.75	2,554.04(L)	.46(L)
October	5,255.40	18,338.36	21,420.33	3,081.97(L)	.57(L)
November	4,409.70	15,026.83	21,873.19	6,846.36(L)	1.55(L)
December	4,243.50	15,850.56	22,058.94	6,208.38(L)	1.46(L)
1944					
January	5,132.80	19,369.84	25,060.36	5,690.52(L)	1.13(L)
February	6,327.65	24,514.73	22,668.80	1,845.93	.30
March	7,680.10	30,963.35	[2] 11,947.18	[2] 19,016.17	[2] 2.49
Total, fiscal year	69,192.50	248,424.85	282,464.82	34,039.47(L)	.49(L)

[1] Figures accompanied by (L) indicate loss; others indicate profit.
[2] Figures affected by recapture of car rentals paid out during the fiscal year in the amount of $6,756.50.

50 The parties agree that the plaintiff's net loss, during the period of Government possession of its mine, was $36,128.96, not taking into consideration amounts that might have been realized by plaintiff by the assessment of strike fines. These fines, however, were not assessed and no income was realized therefrom. Plaintiff's loss for the period of Government possession was $36,128.96.

21. The proof does not establish that plaintiff's loss is attributable to any act of the defendant, except to the extent of $2,241.26, as set out in finding 12. By reason of Government possession and control plaintiff hoisted the American Flag, put up posters and placards, distributed booklets to its miners, and cooperated in supplying certain coal production, work stoppage and mine commissary information, as hereinbefore mentioned. Its management and personnel performed their customary functions and duties in the regular and normal course of its business;

no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. Plaintiff's mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two thousand two hundred forty-one dollars and twenty-six cents ($2,241.26).

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff, the operator of a coal mine, sues to recover its operating loss during the time the Government was in possession of its mine from May 1, 1943, to October 12, 1943.

When the Government took possession it appointed plaintiff's president as the Operating Manager of the business and in-
51 structed him to continue to operate the mine and to sell coal as theretofore, unless otherwise directed. Plaintiff continued operations without any interference on the part of the Government, except in one respect, to be mentioned later. Plaintiff determined the method of operation, determined whether to continue operations in this place or that, or to discontinue them altogether. Plaintiff sold its coal to whom it pleased and at whatever price it could get for it. It collected for coal sold and put the money in its own treasury.

It did all this without let or hindrance from the Government. It operated is business precisely as it had before the Government took possession of it, except in the one instance referred to above. However, it was at all times subject to Government control and direction.

Plaintiff says that at the Government's direction it continued operations beyond the time it believed it advisable to do so, but the proof does not support this contention. As the findings show, plaintiff made its own determination as to whether to continue or discontinue operations, and this without any direction from the defendant or even without any consultation with it.

The Government seized coal mines throughout the country, including plaintiff's, in an effort to end a strike of the United Mine Workers that threatened to seriously cripple our prosecu-

tion of the war. Notwithstanding the disastrous consequences of their action, the United Mine Workers could not be induced to work for the mine owners unless their demands were met, and the owners would not meet their demands. In this extremity the Government decided it would seize the mines in the belief that while the miners would not work for the owners, they would work for the Government. Accordingly, the President issued an order on May 1, 1943, directing the Secretary of the Interior to take immediate possession of all mines in which there was a strike, insofar as this was necessary in the judgment of the Secretary. He was directed to take possession of "all real and personal property, franchises, rights, facilities, funds and other assets used
in connection with the operation of such mines, and to
52 operate or arrange for the operation of such mines in such
manner as he deems necessary for the successful prosecution of the war. * * *"

In carrying out the order he was directed to act through "such public or private instrumentalities or persons as he may designate." It was further ordered:

"He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order."

On the same day, the Secretary of the Interior issued an order taking possession of most of the mines, including plaintiff's. This order read in part:

"I * * * therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mine * * *.

"The president of each company (or its chief executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

"All the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

* * * * *

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company."

By a subsequent order the Secretary of the Interior appointed 11 Regional Managers, who were given "full powers
53 of supervision and direction of the operation of all coal mines in their territorial jurisdiction during the period in which possession has been taken and continues under the authority of the Executive Order." Where necessary, they were authorized "to issue * * * specific directions as to the production, sale and distribution of coal by the mines subject to their supervision, and as to all operating and financial arrangements of such mines." Paragraph 6 of this order read:

"The Operating Managers for the United States appointed by me to operate the several mines, possession of which has been taken by me, as well as all other officers, mine workers and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and directions of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States."

Plaintiff's president accepted appointment as Operating Manager, and, in accordance with the Secretary's direction, he took the following oath:

"I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the Peewee Coal Company."

The Operating Manager was directed to proceed so far as practicable in accordance with previously prevailing policies, but he was directed to "set books up so as to keep separate the period of Government operation."

Upon receipt of the oath the Secretary issued to plaintiff's president a certificate of appointment as Operating Manager for the United States.

Paragraph 5, 6 and 7 of this certificate read as follows:

"(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance
54 with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

"(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

"(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government."

But, while the defendant thus asserted the complete right to direct and control, it, in fact, never exercised this right, except in the one instance mentioned later.

Plaintiff seeks to recover under the Fifth Amendment providing for just compensation when private property is taken by the Government. The defendant says it did not take plaintiff's property, but this position cannot be maintained unless we say that the President's Executive Order and the order of the Secretary of the Interior taking possession of the mine, the oath which the Operating Manager was required to take, and the certificate of appointment issued to the Operating Manager, were all pretense and sham.

All of these things were done in order to induce the miners to return to work. It was done in the belief that they would be willing to work for the Government, although they were unwilling to work for the private owners. We are loath to say that the Government practiced a fraud upon them. Every effort was made to make it appear that the mines were being operated by the Government, and we cannot bring ourselves to say that all this was a premeditated fraud. An old Persian proverb says that "the priceless ingredient of every product is the honor and integrity
55 of its maker." If the Government was dishonest, if its protestations were lacking in integrity, what is there left in

which we can place our trust? The Secretary undoubtedly undertook to take possession of the mines and undertook to make it appear that he had done so, and his authority to do this has not been questioned. We cannot but hold that the Government did in fact, as well as in name, take possession of plaintiff's mine, and that it is liable for whatever consequences flow therefrom.

In the case of United States v. Mine Workers, 330 U. S. 258, it was contended that miners working in mines that had been seized by the Government were Federal employees and that, therefore, the prohibition against injunctions in labor disputes contained in the Norris-LaGuardia Act did not apply. The court said (p. 284) that Congress, in passing the War Labor Disputes Act, "intended that by virtue of Government seizure, a mine should become, for the purposes of production and operation, a Government facility in as complete a sense as if the Government held full title and ownership." The court pointed to the agreement entered into between the United Mine Workers and the Secretary of the Interior providing for wages and operating conditions, and then said (p. 288):

"The defendants, however, point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control."

The court concluded:

"We hold that in a case such as this, where the Government has seized actual possession of the mines, or other facilities, and is operating them, and the relationship between the Government and the workers is that of employer and employee, the Norris-La-Guardia Act does not apply."

56 The material facts in that case and this case are the same. The only difference is that in that case the seizure was under the War Labor Disputes Act, whereas this seizure was prior to the passage of that Act. This, however, seems to us immaterial, since in this case the authority of the Secretary of the Interior to seize the mines is not put in question.

There is in question, however, the liability of the Government for this seizure.

Ordinarily, the measure of liability where the Government takes temporary possession of property is its rental value. United States v. General Motors Corporation, 323 U. S. 373. Plaintiff in this case, however, sues not for the rental value of its mine, but for the losses sustained in operating it while the Government was in possession. In our opinion, there can be no recovery on this basis, because there is no showing that the Government's seizure of the mines caused the loss in operations. Marion & Rye Valley Railway Co. v. United States, 270 U. S. 280.

It is not necessary for us to determine what caused the loss, if it is not shown that the Government caused it, but the findings indicate that the loss was caused, not by the Government's seizure, but by bad mining operations, and by reason of the fact that during this period they ran into a "fault" in the coal seam which made operations unprofitable, and, in fact, later caused the abandonment of the mine.

When this fault was discovered plaintiff made its own determination as to whether or not to continue operations in an effort to get through the fault, without any counsel, advice or directions on the part of defendant.

The approved method of operating a coal mine is to drive the entry in as far as it is ever desired to go, and then to work back toward the opening. This is called the "on the retreat" method of operation. Plaintiff, however, worked forward, or as it is expressed, "on the advance." This means that it would drive the entry in part way and begin mining the rooms at once, advancing the entry as the coal was mined. In mining the rooms plaintiff did not leave sufficiently strong pillars of coal to support the roof and it caved in. This made it impossible to drive the entry in further and mine the rest of the coal in the seam. Together
57 with the fault which was encountered, this was probably the cause of the operating loss.

At any rate, the proof fails to show that the loss was caused by the Government's seizure.

In Marion & Rye Valley Railway Co. v. United States, *supra*, the plaintiff sought to recover because of the alleged seizure of its railroad by the President on December 26, 1917. On that date the President issued a Proclamation in which he said: "[I] do hereby * * * take possession and assume control at 12 o'clock noon on the twenty-eighth day of December 1917, of each and every system of transportation * * * consisting of railroads, * * *" including the plaintiff railroad.

Of the effect on this the court said:

"* * * He did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific

direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. The railroad did not serve any military camp; nor did it transport troops or munitions. The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use."

The court held that there could be no recovery "because nothing of value was taken from the company and it was not subjected by the Government to pecuniary loss. Nominal damages are not recoverable in the Court of Claims. Grant v. United States, 7 Wall. 331, 338."

As in that case, so in this, nothing of value was taken from the company nor was it subjected by the Government to pecuniary loss, so far as the proof shows.

There is, however, one exception to this: The wage agreement, under which the mines were operated prior to the
58 strike, provided $20.00 as vacation compensation. The War Labor Board on May 25, 1943, after the Government's seizure of the mines, modified the agreement by authorizing a vacation payment of $50.00 and the refund of occupational charges like rentals on mine lamps. As we understand, this finding of the War Labor Board was not obligatory on plaintiff, but the Secretary of the Interior, acting through the Solid Fuels Administration, instructed the Operating Managers to carry the Board's decision into effect. Plaintiff did this, as ordered, at a cost to it of $2,241.26. This is an extra expense of operation occasioned by the Government, for which we think plaintiff is entitled to recover. See Wheelock Bros., Inc. v. United States, No. 46982, this day decided. Judgment for this amount will be entered. It is so ordered.

Howell, Judge; Littleton, Judge; and Jones, Chief Judge, concur.

MADDEN, Judge, dissenting.

I am unable to agree with the court's decision. It awards to the plaintiff $2,241.26 as an extra expense of operation occasioned by the Government. This extra expense consisted of an increased vacation allowance to the plaintiff's workmen, and the refund to

them of occupational charges like rentals on mine lamps. The court has not found that the plaintiff could have operated its mine without making the concessions directed by the War Labor Board, nor has it found what the losses to the plaintiff would have been if the Government had not intervened and the strike had continued. I think that the court is not justified in awarding the plaintiff the amount of these expenditures when it does not and, I think, could not, find that the plaintiff was, in fact, financially harmed by the Government's acts.

The question of whether or not there was a taking by the Government is somewhat more difficult than the similar question in Wheelock Bros., Inc. v. The United States, No. 46982, decided today. I am of the impression that there was not a taking, within the meaning of the Constitution, but I think it is unnecessary to decide that question since, as I see it, no harm to the plaintiff has been shown.

59 *Judgment of the court*

Feb. 6, 1950

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of two thousand two hundred forty-one dollars and twenty-six cents ($2,241.26).

61 *Proceedings after entry of judgment*

On March 14, 1950, on motion made therefor and allowed by the court, the defendant filed a motion for a new trial.

On April 3, 1950, the court entered the following order on said motion:

Order

It is ordered this third day of April 1950, that said motion for a new trial be and the same is overruled.

63 [Duly sworn to by jurat omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1950

Supreme Court of the United States

No. 168, October Term, 1950

Order allowing certiorari

Filed October 9, 1950

The petition herein for a writ of certiorari to the United States Court of Claims is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE 1950

No. 168

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OCTOBER TERM, 1950

No. 168

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on February 6, 1950.

OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 88 F. Supp. 426.

JURISDICTION

The judgment of the Court of Claims was entered on February 6, 1950 (R. 48). A motion by the United States for a new trial, seasonably filed,

was denied on April 3, 1950 (R. 48). The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a wage dispute developed between the operators of the nation's bituminous coal mines, including respondent Pewee Coal Company, Inc., and the United Mine Workers of America, representing the miners. The President by Executive Order authorized the assumption of federal control over the coal mines solely for the purpose of putting an end to the miners' work stoppages, since the continued operation of the coal mines was deemed essential to the successful prosecution of the war. The Government's control was not intended to, nor did it in fact, interfere with the normal operations of Pewee's business, and its intervention had the effect of stopping strikes which might well have been ruinous not only to the nation generally but to the coal mine operators. The questions presented are:

1. Whether the Government's intervention resulted in a temporary taking of Pewee's coal mine so as to entitle it to just compensation under the Fifth Amendment.

2. Whether, if there was such a taking, Pewee is entitled to any compensation since no actual loss has been shown and in any event it received substantial benefits from the Government's actions, far outweighing any losses it may have incurred as a result thereof.

STATEMENT

This is a suit for just compensation under the Fifth Amendment (R. 2) for the alleged taking by the Government of Pewee's coal mine, pursuant to Executive Order No. 9340, issued by the President on May 1, 1943, in an effort to avert a nation-wide strike of the coal miners. The Court of Claims held that Pewee's mine had been taken and awarded as just compensation $2,241.26, the amount of increased compensation directed to be paid to the miners during the period of the "taking" in accordance with a War Labor Board (WLB) directive. The facts here pertinent—as found by the Court of Claims—follow:

A. *The Work Stoppages and Government Intervention:* Pewee Coal Company,[1] a Tennessee corporation engaged in the business of mining and marketing bituminous coal, is a member of the Southern Appalachian Coal Operators' Association (R. 3-4). Its 150 miners are members of District 19, United Mine Workers of America (UMWA) (R. 4). When the United States entered World War II, the Association and UMWA

[1] Pewee was organized in August 1939 with its principal offices in Knoxville (R. 3). Its coal mine is in the Cumberland Mountains about 50 miles northwest of Knoxville on property which it leased on November 28, 1939, for a period of 40 years with an option to renew for a further term of 30 years (R. 3). The mine was first opened and developed in 1940; it passed from the development state to production in the early part of 1941 (R. 4). Thereafter, it continuously produced coal, except when its miners were out on strike, until the spring of 1944, when the mine was abandoned because the coal could not be mined profitably (*infra*, fn. 14, pp. 15-16) (R. 39-40).

were parties to various contracts which expired on March 31, 1943 and which governed the terms and conditions of employment at, among others, Pewee's mine[2] (R. 4-5).

At the contract-renewal negotiations which got under way in March 1943, UMWA's president, John L. Lewis, attacked the WLB's "Little Steel" formula[3] as unjustified in view of rising living costs, and sought, as part of his wage demands, a wage increase of $2.00 per day and a minimum wage of $8.00 per day, which the operators rejected (R. 5). The operators' proposal of a thirty-day extension of the existing contract was agreed to by the miners upon the request of the President, to

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[2] The governing contracts were: (1) an agreement of July 5, 1941, known as the "Southern Wage Agreement", (2) a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and (3) a further agreement of February 11, 1943 known as the "Six Day Supplemental Agreement" (R. 4-5). This last contract authorized the six-day work week in the industry and forced Pewee to discontinue its practice of avoiding overtime pay while working the mine six days a week by rotating the men, and instead required it to offer work on a straight five or six-day basis. To avoid the production loss entailed in the shorter work week, Pewee elected to incur the extra cost of a six-day schedule in February, 1943 (R. 23-24).

[3] The War Labor Board was created January 12, 1942, by Executive Order No. 9017 (7 Fed. Reg. 237) for the peaceful determination of labor disputes during the war period whenever there was a failure to reach agreement through collective bargaining. Its creation was an outgrowth of the national "no-strike" agreement which the President obtained from American labor leaders, including John L. Lewis, shortly after Pearl Harbor.

The so-called "Little Steel" formula was promulgated in April 1942 and permitted workers, in general, to receive an increase of up to 15% of their January 1, 1943, pay. *Little Steel Companies*, 1 War Lab. Rep. 325.

whom the operators had appealed to intervene (R. 5-7). On April 9, the southern operators, in accordance with their earlier suggestions (R. 5), officially asked WLB to assume jurisdiction over the dispute and on April 12 made a similar request to the President (R. 6-7).[4] On April 22, the issues were certified to WLB, which held a hearing in which the operators but not the miners participated; the UMWA refused to submit the miners' case to what it deemed a "circumscribed" WLB (*supra*, p. 4) (R. 7-8). Concurrently, a walkout of the miners started which, despite the President's appeal to the miners' patriotism, became complete on April 30 (R. 7-9).

On May 1, 1943, the President issued Executive Order No. 9340 (8 Fed. Reg. 5695) authorizing and directing the Secretary of the Interior "* * * to take immediate possession, so far as may be necessary or desirable" of the struck mines (*infra*, pp. 7-8) (R. 10-11), and later the same day, the Secretary of the Interior issued "Order for Taking Possession" (*infra*, pp. 8-9) (R. 12-13).[5] The

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[4] On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula; that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law; and that excessively high prices be reduced.

[5] The order included all of the approximately 2,850 mines whose output exceeded 50 tons a day and whose aggregate

following day, Mr. Lewis acceded to the Secretary's request and announced a two-week truce (R. 15) which was subsequently extended to May 31, 1943 (R. 16).

On May 25, after further hearings, at which a WLB official represented the miners' interests, WLB rendered its preliminary decision in which it rejected the bulk of the miners' demands, but approved, as of April 1, 1943, the demands that a $30 increase in annual vacation pay be granted and that the operators bear the cost of occupational charges, such as those for lamps furnished the miners (R. 16).[6] The negotiations as to a guaranteed six-day work week and portal pay, which were resumed at WLB's suggestion, soon became deadlocked (R. 16). A second general strike started on June 1 but was terminated at the President's request on June 7 (Pewee's miners returned June 9) under a truce until June 21 (R. 16-17). After further hearings, in which UMWA still refused to participate, WLB on June 18 denied UMWA's demands and, in substance, extended the 1941-1943 agreement, as modified by it on May 25 (*supra*, this page), unless

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tonnage accounted for about 95% of the total bituminous coal production, together with all of the so-called "rail" mines regardless of size (R. 12).

[6] 8 War Lab. Rep. 502. UMWA's demands rejected by WLB included, *inter alia*, a $2.00 a day wage increase, double pay for Sunday work, a guaranteed work-year of 52 weeks. The Board's opinion also indicated that the operators and UMWA should resume negotiations on the demands for a guaranteed six-day week and portal-to-portal pay (R. 16).

changed by mutual agreement (R. 17).[7] A third general strike started on June 21 (R. 17), and despite UMWA's instructions to the miners, at Mr. Ickes' request, to resume work under the Government until October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then, many miners remained idle and Pewee's men stayed out until July 6 (R. 17). Upon the return of the men, both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.[8]

B. *The "Taking" of Pewee's Mine:* The President's Executive Order No. 9340 of May 1, 1943 (8 Fed. Reg. 5695) (*supra*, p. 5), authorized and directed Secretary of the Interior Ickes (R. 10),

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the opera-

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[7] 9 War Lab. Rep. 112. WLB denied the portal-pay claim as beyond its jurisdiction.

[8] These statements were made in accordance with Section 3 of the War Labor Disputes Act (57 Stat. 163, 50 U. S. C. App. 1501 *et seq.*), which Congress enacted on June 25, 1943, over the President's veto, and which provided that "any plant, mine or facility" theretofore or thereafter taken by the United States should be returned "as soon as practicable but in no event more than sixty days after the restoration of the productive efficiency thereof."

tion of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

In his "Order for Taking Possession" (8 Fed. Reg. 5767), also issued on May 1, 1943 (*supra*, p. 5), Secretary Ickes stated (R. 12-13):

* * * I hereby * * * take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

The president of each company (or its chief executive officer) * * * is hereby and until further notice designated operating manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation

of the mine, and for the distribution and sale of the product thereof.

All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

* * * * *

The operating manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

* * * * *

On the same day, Mr. Ickes issued an order designating the eleven regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers, and setting forth their duties and authority (R. 13-15).[9]

"However," the Court of Claims found, "no control over [Pewee's] operations was in fact

[9] Secretary Ickes, also on May 1, delegated his authority under Executive Order No. 9340, to himself as Administrator, and to the Deputy Administrator of the Solid Fuels Administration for War created by Executive Order No. 9332 (8 Fed. Reg. 5355) (R. 13).

exercised," except in regard to the increased employee benefits awarded by WLB (*supra*, p. 6; *infra*, p. 12) (R. 15). The company's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. Plaintiff's mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control." (R. 40-41).

The only actions taken by the federal authorities with respect to Pewee's mine were as follows:[10]

1. On May 1, Secretary Ickes telegraphed the chief executive officer of each mine to indicate his willingness to serve as Operating Manager (R. 18-19). In Pewee's case, the mine superintendent accepted in the absence of the company's president, raised the American flag at the mine, and carried out the other instructions contained in the telegram (R. 19). Subsequently, when the Government called his attention to the fact that no acceptance had been received from him as chief executive officer, Pewee's president promptly telegraphed his own acceptance and confirmed that of the superintendent (R. 19). On May 12, Secretary Ickes sent to the chief executive officer of

[10] Neither party has challenged the validity of these particular actions, the Executive Order, or the Secretary's general action under the Order.

each mining company, including Pewee, a certificate embodying formal instructions and appointment as Operating Manager for the United States (R. 19-21); on May 19, he promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 Fed. Reg. 6655). (R. 21).[11]

On May 5 and 6, the Operating Managers were furnished (1) placards carrying the American flag, the caption "United States Property," and the text of Secretary Ickes' "Order For Taking Possession," (2) other posters carrying the flag and excerpts from the President's radio address May 2 appealing to the miners "to heed the clear call to duty", and (3) booklets containing the full text of the May 2 appeal and extracts from Executive Order 9340 (R. 21-22). As instructed, Pewee's officers put up the posters and placards on the company property and at various places in the mining towns, and distributed the booklets to the miners (R. 22).

2. As part of their contention that living costs had risen disproportionately to wages, the miners claimed that the company stores were disregarding OPA price ceilings (R. 22). On May 3, Secretary Ickes directed that mine stores comply with these regulations (R. 22). Shortly thereafter, the Secretary conducted a survey of company stores and commissaries to determine their costs and selling prices

[11] The pertinent provisions of the Certificate of Appointment and of the Coal Mine Regulations are set out in the Appendix, *infra*, pp. 31-42.

(R. 22). Pewee furnished certain information in regard thereto as requested and in addition advised the Secretary that it would "carefully follow" the May 3 directive (R. 22). Also, about 2 months later, Secretary Ickes, in conjunction with his campaign to reduce accidents in the coal fields, instructed the mines to operate in full compliance with state and federal safety laws and regulations (R. 22).

3. On June 7, 1943, concurrently with the return of the miners to work after the second general strike (*supra*, p. 6), the Solid Fuels Administration instructed the Operating Managers to carry into effect WLB's decision of May 25 in regard to increased vacation compensation and refund of occupational charges (*supra*, p. 6), stating that in all other respects the terms and conditions of employment would continue to be those which obtained under the old contracts (R. 23). These were the terms of employment thruout the remainder of the control period (R. 23). On or about June 30, Pewee made the increased vacation payments at a cost of $1,890 over what the old contract would have required, and refunded $351.26 for lamp rentals previously collected (R. 23).

4. As stated above, Pewee had previously elected to incur the extra cost of a six-day week work schedule, as authorized by the February 11 1943 amendment of the wage contracts (*supra*, fn. 2, p. 4)

(R. 23-24).[12] Although the schedule did not result in the anticipated production, Pewee in March 1943 decided to remain on that schedule (R. 24). On May 3, Secretary Ickes directed all mines to operate on the six-day week, stating that OPA had recently granted coal price increases to cover that operation and he intended to recommend rescission thereof as to any mine that failed to comply (R. 23). On two occasions during May, Pewee informed the Solid Fuels Administration that it intended to continue the six-day week "unless conditions beyond our control, such as car shortage, etc., make this impossible" (R. 24).

3. Prior to government control, the Solid Fuels Administration, in furtherance of its supply and distribution functions under Executive Order 9332, had asked each bituminous coal producer to file a weekly card report of its production and running time (R. 24). On May 12, 1943, the mines were sent a form memorandum requesting prompt submission of these reports so that the Solid Fuels Administration would be informed as to the availability of bituminous coal for war needs (R. 24-25). In order to keep the Government informed regarding work stoppages, their causes and effect on pro-

[12] The amendment also authorized holiday work at time and a half, if consented to by the parties locally (R. 24). While the Government asked the mines to maintain operations on 3 holidays during the period here involved, Pewee was affected only by the request in regard to work on Labor Day and the proof does not reveal whether its men worked on that day (R. 24).

duction, the Operating Managers were instructed, beginning May 17, to make daily reports of tonnage and labor force of the previous day, together with figures which would reflect whether the situation was normal (R. 25). In Pewee's area, this information was collected by telephone by the Government's local representative who then transmitted the results to the regional office (R. 25). These calls were made at the expense of the mines, and in Pewee's case, because of its proximity to the points to and from which they were made, the calls involved a cost of approximately 60 cents a day (R. 25).

6. In accordance with his earlier statement (*supra*, p. 7), Secretary Ickes on July 29 instructed the Operating Managers to furnish information upon which he could make a determination as to the release of their mines (R. 26). In response thereto, Pewee's president on August 6 wrote (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines, if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st [13] would completely bankrupt such mining companies.

[13] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

And on October 4, in response to further requests, respondent's president sent in the requested tonnage figures, with his opinion that (R. 27):

> * * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc.

Meanwhile, beginning on August 20, Secretary Ickes, on the basis of figures submitted, continued to release mines, until October 12 when he promulgated an omnibus order releasing all remaining mines, including Pewee (R. 25-26).

In its opinion, the Court of Claims, relying on *United States* v. *United Mine Workers*, 330 U. S. 258, held that "the Government did in fact, as well as in name, take possession of [Pewee's] mine" (R. 45). It refused to award as a part of just compensation the $36,128.96 loss suffered by Pewee during the period of government control on the ground that it was not attributable to any act of the Government (R. 46-47).[14] The court, however,

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[14] The court found that Pewee's tonnage was seriously reduced subsequent to May 1, 1943 by underground physical conditions due to (1) the use of the unconventional method of working the mine "on the advance" rather than "on the retreat," and (2) the taking of excessive amounts of coal from certain of the pillars and room walls, thus weakening the supports and setting in motion a gradual shifting of the mountain top above the mine (R. 30). This movement or "squeeze" finally manifested itself in May 1943, with the result that

referring to *Wheelock Bros., Inc.* v. *United States*, C. Cls. No. 46982, which it decided on the same day, held that the increased compensation amounting to $2,241.26 (*supra*, p. 12) which Secretary Ickes had directed to be paid in accordance with WLB's directive was an extra expense occasioned by the Government's action, and entered its judgment for that amount (R. 48). Judge Madden dissented (R. 47-48).

REASONS FOR GRANTING THE WRIT

This case and *United States* v. *Wheelock Bros., Inc.*, No. 169, in which the Government is simultaneously filing a petition for a writ of certiorari, raise important and novel questions, one of which was suggested but found unnecessary to be passed upon in *United States* v. *United Mine Workers*, 330 U. S. 258. In both cases, the Government intervened to avert a work stoppage which would have crippled a vital industry necessary for the successful prosecution of the war. In each case, as has been true in the greater percentage of businesses involved in similar seizures, the Government's control was not intended to, nor did it in fact, interfere with the normal operation of the business. In each case, it is demonstrable that the

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the roof began collapsing in part of the mine (R. 30-31). Also in July 1943, the mine's main entry was driven into the initial stages of a "fault" or low-coal area (R. 31). After numerous conferences among Pewee's officers (in which government officials did not participate) it was decided to continue trying to work the mine (R. 32-33). But since there was no indication that the fault would disappear, it was decided temporarily to abandon the mine in January 1944 (R. 34, 39). The mine was permanently abandoned a few months thereafter (R. 39).

Government's intervention had the effect of preventing a strike which might well have been ruinous not only to the nation generally but to the owners of the enterprises involved.

The holdings by the court below that these actions of the Government resulted in a Fifth Amendment "taking" and that the just compensation for such taking is to be measured by the increased wage benefits paid the employees during the period of the taking, are, we believe, clearly unsound. These holdings, if not corrected, will establish a rule under which large and uncharted liabilities, possibly aggregating scores of millions of dollars, can be imposed on the Government for other such seizures, including (1) the three subsequent seizures of the Nation's approximately 3,000 coal mines employing about 400,000 miners,[15] and (2) the seizure of the 102 other midwestern motor carrier systems similar to that involved in *Wheelock*, claims for which are now pending before a

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[15] On November 1, 1943, shortly after the release of the mines seized pursuant to Executive Order No. 9340, the coal mines were again seized in order to avert another threatened nation-wide coal strike (see Executive Order 9393, 8 Fed. Reg. 14877); the mines so seized were not all released until June 21, 1944 (9 Fed. Reg. 6954). The Government seized the bituminous coal mines a third time, on April 10, 1945 (see Executive Order 9536, 10 Fed. Reg. 3939), and released them by the middle of June 1945. 10 Fed. Reg. 7263, 7265. The fourth seizure of the bituminous coal mines was on May 21, 1946 (see Executive Order 9728, 11 Fed. Reg. 5593) and lasted until June 30, 1947, when the War Labor Disputes Act expired. 12 Fed. Reg. 4248. This last seizure was the one involved in *United States* v. *United Mine Workers*, 330 U. S. 258.

special Motor Carrier Claims Commission.[16] In addition, the decisions below will have great effect upon the future use of, and future legislation involving, this method for effective government control of strikes in critical industries, the necessity for which has been increasingly shown by the events of recent years.

1. The facts of this case fall far short of showing such interference with, or destruction of, Pewee's ownership, possession, or use of its property as would be necessary, under any proper reading of the Fifth Amendment's just compensation clause, to support the conclusion that there had been a "taking" of the coal mine. See, *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; *United States* v. *Lynah*, 188 U. S. 445, 469-470; *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 171; *Block* v. *Hirsh*, 256 U. S. 135; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393; *Lichter* v. *United States*, 334 U. S. 742; *Marion & Rye Valley Railway* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280; *Nevada-California-Oregon Ry.* v. *United*

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[16] The Motor Carrier Claims Commission was created by the Act of July 2, 1948 (62 Stat. 1222, 49 U. S. C., Supp. II, 305 note) to pass on the claims arising out of the Government's seizure of motor carrier transportation systems under Executive Order No. 9462 (9 Fed. Reg. 10071), involved in *Wheelock*. While refraining from "a blanket endorsement of a 'taking' in the legal sense," Congress established this Commission in order to provide a more expeditious means for handling the carriers' claims than those provided by normal channels. H. Rep. No. 2182, 80th Cong., 2d sess., p. 3. The disposition of these claims, aggregating several millions of dollars, will undoubtedly be in large measure influenced, if not controlled, by the cases here.

States, 65 C. Cls. 75, certiorari denied, 278 U. S. 602; 1 Lewis, *Eminent Domain* (3rd Ed.), Sec. 65.

(a) In holding that there was a taking, the court below relied primarily on the terms of Executive Order No. 9340 and the directives issued by Secretary Ickes. But directives such as those requiring the flying of the American flag, the displaying of certain posters, and the distribution of booklets to the miners, clearly involved no interference, substantial or otherwise, with the management and control of Pewee's coal mine. Other directives providing that the company stores reduce price to OPA ceilings (*supra*, pp. 11-12); that the company comply with state and federal safety laws (*supra*, p. 12); and that the Solid Fuels Administration be furnished with daily tonnage and labor figures (*supra*, pp. 13-14), imposed no additional burden on Pewee, since they merely required compliance with laws and Executive Orders to which Pewee had already been subject. The same is true of the order (*supra*, p. 12), requiring payment of increased benefits to the miners in accordance with WLB's directive. As the findings plainly demonstrate, this award, which gave the miners but a small fraction of their demands, was fully acceptable to the operators upon whose repeated requests the dispute had been submitted to the WLB and who, unlike UMWA, had participated actively in the WLB proceedings. *Supra*, pp. 5-7.

Not only do these directives fail to show, in themselves, that Pewee's mine was actually taken, but any such inference which might be drawn from them is more than overbalanced by the Government's limited objective for intervening—termination of the miner's work stoppages which threatened the nation's economy and obstructed the war effort—and by the restricted scope of the Government's other actions. Taken together, these factors make it quite clear that Pewee's mine was in fact not taken by the United States within the meaning of the Fifth Amendment. For while the President by his Executive Order authorized and directed Secretary Ickes to take the mines in the constitutional sense, he did not require that this be done unless it be "necessary or desirable", and he patently intended a minimum of interference with the management of the mines; he instructed Secretary Ickes to "permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order," which were, as the order stated, "to protect the interests of the nation at war and the right of workers to continue at work" (R. 10).

Consistently with this direction, Secretary Ickes did not undertake to interfere with or take over Pewee's operations. In designating the chief executive officer of each mine as its Operating Manager, Secretary Ickes advised him and all other officers and employees to proceed with the performance of "their usual functions and duties in

connection with the operation of the mine and the production, distribution and sale of the product thereof." Appendix, *infra*, p. 31. The Coal Mine Regulations, in addition to containing similar provisions as to the Operating Managers,[17] went further and permitted the company to continue (1) to enter and discharge contracts and other obligations in the ordinary way, (2) to serve customers of their own selection, (3) to effect such financial transactions as they deemed necessary "utilizing any or all funds due or owing or belonging to the company," (4) to collect and retain the revenues from the business,[18] (5) to effect such changes in the plant, equipment, and capital structure as they saw fit, (6) to remain subject to all state laws,[19] and (7) to

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[17] The Regulations provided that the Operating Manager was to serve his company as its authorized agent in respect of all actions he was empowered to take "in the absence of Government control," that he remained "subject to all restrictions and limitations imposed by the company" upon his authority, that he was to continue performing for his company all "ordinary duties of management in accordance with established policies and practices," and that his appointment could be objected to or revoked at the company's request. *Infra*, pp. 36-38. As Operating Manager, the company's chief executive was called upon to perform for the Government only such "special duties" as were or might be required in connection with the control program (*infra*, p. 38).

[18] If Pewee's property had been "taken", its revenues would have belonged to the Government. *E. I. duPont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, 185. Pewee did not, however, treat the revenues from its business as being received for the Government's account nor was it required to do so.

[19] This, of course, was incompatible with a "taking" since state laws would have been inapplicable to federal property. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554; *North Carolina Railroad Co.* v. *Lee*, 260 U. S. 16.

be amenable to suit as fully as if government control had not intervened. Appendix, *infra*, p. 34, *et seq.* And, as contemplated by the Secretary's regulations, business did continue as usual without interference by the Government. The court below found that during the period of government control, Pewee's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. [Pewee's] mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control" (R. 40-41). See, also, R. 41-42.

Clearly, therefore, although the Government had the power to take the mines, the situation as it developed made the exercise of that power unnecessary and hence there was, we submit, no taking. The Executive Order and the powers vested in the Secretary constituted no more than formal notification that a taking would occur if that action turned out to be "necessary or desirable", and if control-less-than-taking were insufficient. Cf. *United States* v. *Sponenbarger*, 308 U.S. 256, 267-8. And, as we have shown, the Secretary's subsequent orders and regulations, far from consummating this potential power to take respondent's mine, defin-

itively negatived such a step.[20] In addition, the clear net benefit to the company from the take-over (*infra*, pp. 28-30) supplies separate support for the same conclusion, since a taking will not readily be inferred from Government action "that does little injury in comparison with far greater benefits conferred" (*United States* v. *Sponenbarger*, *supra*, at 266-267).

(b) The Court of Claims' conclusion here is also at odds with its earlier holding in *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280, where in closely analogous circumstances the Court of Claims held that there had been no Fifth Amendment taking.[21] In that case, which arose out of Federal control and operation of the railroads during World War I, the

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[20] For lower court decisions suggesting, in other contexts, that operators of coal mines subject to Government seizure were not deprived of the ownership, use, or possession of their property, see *Warner Coal Corp.* v. *Costanzo Transportation Co.*, 144 F. 2d 589, 593-4 (C. A. 4), certiorari denied, 323 U. S. 791; *Glen Alden Coal Co.* v. *N. L. R. B.*, 141 F. 2d 47, 51-2 (C. A. 3); *Consagra Coal Co.* v. *Borough of Blakely*, 55 F. Supp. 76 (M. D. Pa.); *Stanton* v. *Ruthbell Coal Co.*, 127 W. Va. 685, 694-698.

[21] On appeal, this Court found it unnecessary to pass on this question, since the Court held that "even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss" (270 U. S. at 282). See *infra*, p. 30.

See, also, *Nevada-California-Oregon Ry.* v. *United States*, 65 C. Cls. 75, certiorari denied, 278 U. S. 602, where the Court of Claims, on even stronger facts, again held that there had been no taking.

President issued a Proclamation in which he announced *inter alia* that "I * * * do hereby * * * take possession, and assume control * * * of * * * every system of transportation" and that "all transportation systems shall conclusively be deemed within the possession and control of [the Director General of Railroads] without further act or notice" (60 C. Cls. at 231-234, 232, 234). The Proclamation, moreover, unlike the present Executive Order, expressly provided for the payment of just and reasonable compensation. 60 C. Cls. at 233. The Director General of Railroads issued to the railroad orders reciting that he had "taken possession and assumed control of" the transportation system; that officers, agents and employees of such system "may continue in the performance of their present regular duties"; that accounts of the railroads should be closed as of the beginning date of Federal control and opened as of the next day (60 C. Cls. at 237-238); and that "Every railroad officer and employee is now, in effect, in the service of the United States" (60 C. Cls. at 239). He also ordered a general increase in rates (60 C. Cls. at 241). The Court of Claims found further, as it did here, that (in the words used by this Court in summarizing the findings, 270 U. S., at 282-283):

> [the Director General of Railroads] did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activi-

> ties. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or purpose of operation. * * * The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use.

Based on these findings, the court concluded that there had been no taking, since, it held (60 C. Cls., at 249-250) there was an absence of the evidence necessary

> to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. * * * A mere declaration of an intention to take cannot constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive

> proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it cannot be said that there is a taking within the meaning of the Constitution.

The detailed findings of the Court of Claims in the present case similarly reveal that the Government's action did not result in interference with the control and operation of Pewee and, accordingly, that Pewee's mine was never taken.[22]

(c) Contrary to the court below (R. 45), *United States* v. *United Mine Workers*, 330 U. S. 258, is not decisive here. The instant problem, while suggested in the *Mine Workers* opinion, was expressedly not passed upon by the Court. That case, which arose during the fourth government coal mine seizure in 1946-7 (*supra*, fn. 15, p. 17), did not involve any determination of the relationship between the Government and the operators, but rather was mainly concerned with the relation-

[22] The comprehensive regulation of the coal mines under the Bituminous Coal Act of 1937—pursuant to which minimum coal prices were prescribed, production practices were regulated in certain respects, marketing was subject to detailed rules relating, *inter alia*, to discounts and payment terms, records had to be kept in a specified manner, and monthly reports relating to costs, tonnage, and income had to be filed—has never been thought to involve a "taking." See, *e. g.*, *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

ship between the Government and the miners for the limited purpose of determining the applicability of the anti-injunction provisions of the Norris-LaGuardia Act.[23] In holding that for this purpose the miners were employees of the Government, the Court relied primarily upon the objectives of government control and the Krug-Lewis agreement to which, the Court noted, the operators were not a party (330 U. S. at 287). The Court refused to "express any opinion as to the validity" of the various provisions of the Regulations defining the Government-operator relationship since they had "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (330 U. S. at 288). Moreover, nowhere in the concurring opinion of Justice Frankfurter or the dissenting opinions of Justices Murphy and Rutledge is there any indication that these justices considered the Court's opinion as defining the relation between the Government and the operators or that they believed the mine properties to have been taken by the Gov-

[23] The Court's opinion states (330 U. S. at 285-286): "The question with which we are confronted is not whether the workers in mines under Government seizure are 'employees' of the Federal Government for every purpose which might be conceived [citing Sec. 23 of the Revised Regulations for the Operations of the Coal Mines Under Government Control, which provides "• • • nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment"] but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee."

ernment from the operators (330 U. S. at 307, 335 *et seq.*); the implications are, rather, to the contrary (330 U. S., at 319-322, 337-339). Justices Black and Douglas alone expressed the thought that "the Government operates these mines for its own account as a matter of law", but they, too, recognized that this was "apparently contrary to the implications of the regulations" (330 U. S. at 329).

2. The Court of Claims further erred in awarding as the measure of just compensation the amount of increased benefits which Secretary Ickes directed to be paid to the miners in accordance with WLB's findings of May 25, 1943, *supra*, pp. 6, 12. This holding was predicated on the similar ruling in the *Wheelock* case. In our petition in *Wheelock*, we show the unsoundness of that ruling as there applied (see Petition in No. 169, pp. 24-27). We think that that holding is *a fortiori* without substance in this case, for here, unlike *Wheelock*, the Government's intervention, as well as WLB's subsequent award, was fully acceptable to the operators. There is no reason to believe, on the one hand, that respondent would have refused to pay these increased benefits had the miners agreed to continue working on that basis without Government control (*supra*, pp. 5-7); and, on the other hand, it is plain that federal intervention resulted in a net benefit to the company. The Government intervened because the miners' heavy

demands and their refusal to submit them to WLB resulted in a deadlock in negotiations. It was only after the Government intervention that the miners reluctantly, after two additional general walk-outs of short duration, agreed to remain in the mines until October 31, 1943, and then only under an arrangement which would "automatically terminate if the government control is vacated" (R. 17). Not only was Pewee, together with the other operators, thereby relieved of the threat of heavy losses involved in maintaining an idle mine with its fixed overheads,[24] but they were also protected during the period of government control against the renewal by the miners of their wage demands, only a very small part of which Pewee was required to pay pursuant to WLB's award.

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[24] "Coal operators are very sensitive to changes in the volume of production since there is an unusually large element of overhead. Capital charges go on unabated, and as days of operation diminish, the cost per ton increases rapidly. Property taxes are in no way moderated. Insurance has to be kept up. Pumping and ventilation costs do not diminish proportional with decreased tonnage. Depreciation goes on faster when the mine is idle than when it is working. Gas and acid waters require use of men, materials, and power. If the mine is mechanized, fixed charges are greater than otherwise in relation to direct costs * * *.

"Furthermore, the pressure to maintain production is brought about by the fact that if the mine is not maintained at operating efficiency it shortly becomes completely unusable. Falls of roof, squeezes, etc., set in and make recovery difficult if not impossible. The investment, in other words, has a very definite time element running against it. Maintenance workers' pay continues regardless of the time the mine operates. Superintendents must be paid; office employees are hired by the month." *The Coal Industry* by G. L. Parker, at p. 6. See also Hearings before House Committee on Ways and Means on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st sess., at pp. 241-244.

That Pewee was aware of the great benefits it would and did receive from Government intervention is manifest both from the eagerness with which Pewee welcomed federal intervention (R. 19), and its recommendation of August 6 against termination of government control on the ground that a "$1.25 per day wage increase retroactive to April 1st [which reflected a 75% reduction over UMWA's original $5 a day demands] would completely bankrupt [it]" (R. 26-27), *supra*, p. 14. Clearly, therefore, even if there were a taking of Pewee's mine, it was not such a taking as entitled Pewee to any compensation under the Fifth Amendment, for there is no showing that the company incurred any loss as a result of the Government's action, and, in any event, the benefits resulting to Pewee were far greater than any losses it may have suffered; accordingly, "it would be gross injustice to * * * pay something for nothing." *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, 252, affirmed, 270 U. S. 280, 282, (*supra*, fn. 21, p. 23); *United States* v. *Sponenbarger*, 308 U. S. 256, 267; *United States* v. *Miller*, 317 U. S. 369, 376; *Bauman* v. *Ross*, 167 U. S. 548, 573-587.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1950.

APPENDIX

1. The Certificate of Appointment of Operating Managers, which is reproduced in the findings below (R. 19-21), provided:

> Whereas The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:
>
> (1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.
>
> (2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.
>
> (3) The Operating Manager shall, in the operation of said mines, use the customary

personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules and regulations issued by the Solid Fuels Administrator for War.

(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

(10) The Operating Manager shall, in such operation, distribution and sale, comply with all applicable Federal and State laws and regulations.

(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of Company)", but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

(14) This appointment shall be effective immediately.

2. The Coal Mines Regulations (8 Fed. Reg. 6655) provided in pertinent part:

PART 603—OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

GENERAL

* * * * * * *

§ 603.4 *Purpose of operation.* The primary object of Government intervention in the operation of the said properties is the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, * * *

§ 603.5 *Plan and policy of operation.* (a) Control of the operations of the coal mines will be exercised by the Government to the extent necessary to maintain maximum production. Wherever the cooperation of the company and its personnel can be secured, the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of business as a going enterprise, conforming with such directions as the Government may issue. * * *

(b) All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production.

(c) Possession and operation by the Government are to be terminated as soon as this

can be done without injury to the furtherance of the war program.

* * * * * * *

ORGANIZATION FOR OPERATION

* * * * * * *

§ 603.15 *Designation of Operating Managers.* (a) The operation of the coal mines of a mining company will ordinarily be entrusted to an officer of the company formerly in charge of operations who is authorized to act for the said company and who will, under appointment by the Administrator, during the period of Government control, act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company. At the request of the said company, such person may be removed from the position of Operating Manager for the United States, and an officer or employee of the company nominated by the company may be appointed by the Administrator.

(b) Where the prompt and effective cooperation of the mining company in the operation of the coal mines under Government control cannot be secured, a person other than an officer or employee of the company may be designated as the Operating Manager for the United States by the Administrator.

(c) Where a company is in receivership or trusteeship, the receiver or trustee will ordinarily be designated Operating Manager for the United States.

§ 603.16 *Status of Operating Managers.* (a) Any officer or employee of a mining company

who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

(b) The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concurrence before he takes such action. * * *

(c) Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

(d) The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager.

§ 603.17 *Duties of Operating Managers.* (a) Operating Managers shall perform for their companies ordinary duties of management in

accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

(b) An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of company)".

OPERATION OF MINES

§ 603.20 *Statement of property taken.* The Operating Manager of each mine shall promptly submit to the Regional Manager of the area in which the mine is located a statement specifically enumerating and defining the properties under his management, in accordance with a form to be furnished by the Administrator. Such statement shall be promptly submitted by the Regional Manager to the Administrator with recommendations as to any corrections that may appear proper and shall be subject to such correction as the Administrator, or any other official specifically

designated for the purpose by the Administrator, shall from time to time find to be necessary. A copy of such revised statement shall be returned to each Operating Manager to serve as a guide to him and any successor Operating Manager in the performance of their functions.

§ 603.21 *Accounts and records.* (a) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise. The same set of books may be used so long as items of payments, receipts, and all other transactions engaged in on and after May 1, 1943, may be easily separated from items concerning transactions engaged in before that date.

(b) The Operating Manager shall render such accounting as the Administrator may, from time to time, prescribe.

§ 603.22 *Financial and commercial transactions.* (a) Ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company. The Operating Managers shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to continue the enterprise, utilizing any funds or properties due or belonging to the mining company,

and shall draw upon the funds and accounts of the company, utilizing customary sources of credits or funds, and make all necessary disbursements. No major disbursements of an extraordinary nature shall be made without the approval of the Regional Manager.

(b) The Operating Managers shall, if the need arises, inform all third persons with whom they enter into such transactions that such transactions are being carried on, under the authority of the Government and the company, in accordance with customary procedures and policies, that the company remains subject to the usual methods of enforcement of its obligations, and that the Government expects that the acts and agreements of the company will be accorded the same consideration and effect as in the absence of Government control.

§ 603.23 *Employment*—(a) *Working conditions.* In accordance with Executive Order No. 9340, the customary working conditions shall be maintained in all mines.

(b) *Collective bargaining.* In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers' grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other

mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.

(c) *Employment benefits.* All benefits enjoyed by employees of the mine under private control, including State and Federal insurance payments and benefits, workmen's compensation coverage, and group insurance, and all arrangements governing the payment of wages, including war bond purchase plans and the check-off of union dues, shall be continued.

(d) *Personnel.* Operating Managers shall use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but they shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, they shall communicate with the appropriate Regional Manager for transmission of said request to the proper officials.

(1) All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9340 to serve the Government of the United States, but nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.

§ 603.24 *Application of Federal and State Laws.* (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes, contributions, and assessments in the customary manner.

(b) The mining companies are deemed to remain subject to suit as heretofore. However, no Operating Manager or Regional Manager is authorized to bring suit, accept service, or enter any legal proceeding, on behalf of the United States without specific direction from the Administrator. Information as to the pendency, necessity, or probability of any legal proceeding which casts in question any right of the United States should be promptly transmitted by the Operating Manager to the Regional Manager and by the latter officer to the Administrator, with appropriate recommendations concerning the assignment of legal counsel if such assignment is indicated.

(c) The possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property.

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Brief for the U.S.

No. 168

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 115 C. Cls. 626.

JURISDICTION

The judgment of the Court of Claims was entered on February 6, 1950 (R. 48). A motion by the United States for a new trial, seasonably filed, was denied on April 3, 1950 (R. 48). The petition for a writ of certiorari was filed on June 30, 1950 and was granted on October 9, 1950 (R. 49). The jurisdiction of this Court rests upon 28 U.S.C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a wage dispute developed between the operators of the nation's bituminous coal mines, including respondent Pewee Coal Company, Inc., and the United Mine Workers of America, representing the miners. The President, by Executive Order, authorized the assumption of federal control over the coal mines solely for the purpose of putting an end to the miners' work stoppages, since the continued operation of the coal mines was deemed essential to the successful prosecution of the war. The Government's control was not intended to, nor did it in fact, interfere with the normal operations of Pewee's business, and its intervention had the effect of stopping strikes which might well have been ruinous not only to the nation generally but to the coal mine operators. The questions presented are:

1. Whether the Government's intervention resulted in a temporary taking of Pewee's coal mine so as to entitle it to just compensation under the Fifth Amendment.

2. Whether, if there was such a taking, Pewee is entitled to any compensation, since no actual loss has been shown, and in any event it received substantial benefits from the Government's actions, far outweighing any losses it may have incurred as a result thereof.

REGULATIONS INVOLVED

The Coal Mines Regulations, and certain other pertinent materials are set forth in the Appendix, *infra*, pp. 96-137.

STATEMENT

This is a suit for just compensation under the Fifth Amendment (R. 2) for the alleged taking by the Government of Pewee's coal mine, pursuant to Executive Order No. 9340, issued by the President on May 1, 1943, in an effort to avert a nation-wide strike of the coal miners. The Court of Claims held that Pewee's mine had been taken and awarded as just compensation $2,241.26, the amount of increased compensation directed to be paid to the miners during the period of the "taking" in accordance with a War Labor Board (WLB) directive. The facts here pertinent—as found by the Court of Claims—follow:

A. *The work stoppages and Government intervention:* Pewee Coal Company,[1] a Tennessee corporation engaged in the business of mining and

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[1] Pewee was organized in August 1939 with its principal offices in Knoxville (R. 3). Its coal mine is in the Cumberland Mountains about 50 miles northwest of Knoxville on property which it leased on November 28, 1939, for a period of 40 years with an option to renew for a further term of 30 years (R. 3). The mine was first opened and developed in 1940; it passed from the development state to production in the early part of 1941 (R. 4). Thereafter, it continuously produced coal, except when its miners were out on strike, until the spring of 1944, when the mine was abandoned because the coal could not be mined profitably (*infra*, fn. 15, p. 16) (R. 39-40).

marketing bituminous coal, is a member of the Southern Appalachian Coal Operators' Association (R. 3-4). Its 150 miners are members of District 19, United Mine Workers of America (UMWA) (R. 4). When the United States entered World War II, the Association and UMWA were parties to various contracts expiring on March 31, 1943, which governed the terms and conditions of employment at, among others, Pewee's Mine (R. 4-5).[2]

At the contract-renewal negotiations which got under way in March 1943, UMWA's president, John L. Lewis, attacked the WLB's "Little Steel" formula[3] as unjustified in view of rising living

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[2] The governing contracts were: (1) an agreement of July 5, 1941, known as the "Southern Wage Agreement", (2) a subsidiary agreement of October 23, 1941, known as the "Southern Appalachian District Agreement," and (3) a further agreement of February 11, 1943, known as the "Six Day Supplemental Agreement" (R. 4-5). This last contract authorized the six-day work week in the industry and forced Pewee to discontinue its practice of avoiding overtime pay while working the mine six days a week by rotating the men, and instead required it to offer work on a straight five or six-day basis. To avoid the production loss entailed in the shorter work week, Pewee elected to incur the extra cost of a six-day schedule in February, 1943 (R. 23-24).

[3] The War Labor Board was created January 12, 1942, by Executive Order No. 9017 (7 Fed. Reg. 237) for the peaceful determination of labor disputes during the war period whenever there was a failure to reach agreement through collective bargaining. Its creation was an outgrowth of the national "no-strike" agreement which the President obtained from American Labor leaders, including John L. Lewis, shortly after Pearl Harbor.

The so-called "Little Steel" formula was promulgated in April 1942 and permitted workers, in general, to receive an increase of up to 15% of their January 1, 1943 pay. *Little Steel Companies*, 1 War Lab. Rep. 325.

costs, and sought, as part of his wage demands, a wage increase of $2.00 per day and a minimum wage of $8.00 per day, which the operators rejected (R. 5). The operators' proposal of a thirty-day extension (from April 1, 1943) of the existing contract was agreed to by the miners upon the request of the President, to whom the operators had appealed to intervene (R. 5-7). On April 9, the southern operators, in accordance with their earlier suggestions (R. 5), officially asked WLB to assume jurisdiction over the dispute and on April 12 made a similar request to the President (R. 6-7).[4] On April 22, the issues were certified to WLB, which held a hearing in which the operators but not the miners participated; the UMWA refused to submit the miners' case to what it deemed a "circumscribed" WLB (*supra*, pp. 4-5) (R. 7-8). Concurrently, a walkout of the miners started which, despite the President's appeal to the miners' patriotism, became complete on April 30 (R. 7-9).

On May 1, 1943, the President issued Executive Order No. 9340 (8 Fed. Reg. 5695) authorizing and directing the Secretary of the Interior "* * *

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[4] On April 8, 1943, the President issued his so-called "hold-the-line" Executive Order, No. 9328 (8 F. R. 4681), directing, *inter alia*, that the several government agencies charged with the stabilization of wages and prices authorize no further wage or salary increases except those which were necessary to correct substandards of living and were within the framework of the "Little Steel" formula; that no increases in the ceiling prices of commodities be authorized except to the minimum extent permitted by law; and that excessively high prices be reduced.

to take immediate possession, so far as may be necessary or desirable" of the struck mines (*infra*, (p. 8) (R. 10-11). Later the same day, the Secretary of the Interior issued his "Order for Taking Possession" (*infra*, pp. 8-10) (R. 12-13).[5] The following day, Mr. Lewis acceded to the Secretary's request and announced a two-week truce (R. 15) which was subsequently extended to May 31, 1943 (R. 16).

On May 25, after further hearings, at which a WLB official represented the miners' interests, WLB rendered its preliminary decision in which it rejected the bulk of the miners' demands, but approved, as of April 1, 1943, the demands that a $30 increase in annual vacation pay be granted and that the operators bear the cost of occupational charges, such as those for lamps furnished the miners (R. 16).[6] The Board's opinion also indicated that the operators and UMWA should resume negotiations on the demands for a guaranteed six-day week and portal-to-portal pay (R. 16).

The negotiations as to a guaranteed six-day work week and portal pay, which were resumed at WLB's suggestion, soon became deadlocked (R.

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[5] The order included all of the approximately 2,850 mines whose output exceeded 50 tons a day and whose aggregate tonnage accounted for about 95% of the total bituminous coal production, together with all of the so-called "rail" mines, regardless of size (R. 12).

[6] 8 War Lab. Rep. 502. UMWA's demands rejected by WLB included, *inter alia*, a $2.00 a day wage increase, double pay for Sunday work, a guaranteed work-year of 52 weeks.

16). A second general strike started on June 1 but was terminated at the President's request on June 7 (Pewee's miners returned June 9) under a truce until June 21 (R. 16-17). After further hearings, in which UMWA still refused to participate, WLB, on June 18, denied UMWA's demands and in substance extended the 1941-1943 agreement (*supra*, fn. 2, p. 4), as modified by it on May 25 (*supra*, p. 6), unless changed by mutual agreement (R. 17).[7]

A third general strike started on June 21 (R. 17), and despite UMWA's instructions to the miners, at Mr. Ickes' request, to resume work under the Government until October 31, 1943, with the understanding that the arrangement would "automatically terminate if government control is vacated" before then, many miners remained idle and Pewee's men stayed out until July 6 (R. 17). Upon the return of the men, both the President and Secretary Ickes stated that control of the mines would be terminated within 60 days after attaining full productivity.[8] There were no more work stoppages in the period prior to the government's re-

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[7] 9 War Lab. Rep. 112. WLB denied the portal-pay claim as beyond its jurisdiction.

[8] These statements were made in accordance with Section 3 of the War Labor Disputes Act (57 Stat. 163, 164, 50 U. S. C. App. 309), which Congress enacted on June 25, 1943, over the President's veto, and which provided that "any plant, mine or facility" theretofore or thereafter taken by the United States should be returned "as soon as practicable but in no event more than sixty days after the restoration of the productive efficiency thereof."

linquishment of control of Pewee's mine on October 12, 1943 (*infra*, pp. 15-16).

B. *The Government control of Pewee's mine:*

1. The President's Executive Order No. 9340 of May 1, 1943 (8 Fed. Reg. 5695) (*supra*, pp. 5-6), authorized and directed Secretary of the Interior Ickes (R. 10):

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.
>
> In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

In his "Order for Taking Possession" (8 Fed. Reg. 5767), also issued on May 1, 1943 (*supra*, p. 6), Secretary Ickes stated (R. 12-13):

> * * * I hereby * * * take possession of each such mine including any and all real and

personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.

The president of each company (or its chief executive officer) * * * is hereby and until further notice designated operating manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

* * * * *

The operating manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons

in possession of funds and properties due and owing to the company.

* * * * *

On the same day, Mr. Ickes issued an order designating the eleven regional managers of the Bituminous Coal Division, Department of the Interior, as regional bituminous coal managers, and setting forth their duties and authority (R. 13-15).[9]

2. "However," the Court of Claims found, "no control over [Pewee's] operations was in fact exercised," except in regard to the increased employee benefits awarded by WLB (*supra*, p. 6; *infra*, pp. 12-13, 16) (R. 15). The company's "management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner. [Respondent's] mining operations subsequent to May 1, 1943, are not shown to have been in any respect different because of Government control." (R. 40-41).

3. The only actions taken by the federal authorities with respect to Pewee's mine were as follows:[10]

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[9] Secretary Ickes, also on May 1, delegated his authority under Executive Order No. 9340 to himself as Administrator, and to the Deputy Administrator of the Solid Fuels Administration for War created by Executive Order No. 9332 (8 Fed. Reg. 5355) (R. 13).

[10] Neither party has challenged the validity of these particular actions, the Executive Order, or the Secretary's general action under the Order.

a. *Appointment of respondent's president as operating manager:* On May 1, Secretary Ickes telegraphed the chief executive officer of each mine to indicate his willingness to serve as Operating Manager (R. 18-19). In Pewee's case, the mine superintendent accepted in the absence of the company's president, raised the American flag at the mine, and carried out the other instructions contained in the telegram (R. 19). Subsequently, when the Government called his attention to the fact that no acceptance had been received from him as chief executive officer, Pewee's president promptly telegraphed his own acceptance and confirmed that of the superintendent (R. 19). On May 12, Secretary Ickes sent to the chief executive officer of each mining company, including Pewee, a certificate embodying formal instructions and appointment as Operating Manager for the United States (R. 19-21); on May 19, he promulgated "Regulations for the Operation of Coal Mines under Government Control" (8 Fed. Reg. 6655). (R. 21).[11]

b. *Placards, posters, and booklets:* On May 5 and 6, the Operating Managers were furnished (1) placards carrying the American flag, the caption "United States Property," and the text of Secretary Ickes' "Order For Taking Possession,"

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[11] The provisions of the Certificate of Appointment and of the Coal Mine Regulations are set out in the Appendix, *infra*, pp. 96-137.

(2) other posters carrying the flag and excerpts from the President's radio address of May 2, appealing to the miners "to heed the clear call to duty", and (3) booklets containing the full text of the May 2 appeal and extracts from Executive Order 9340 (R. 21-22). As instructed, Pewee's officers put up the posters and placards on the company property and at various places in the mining towns, and distributed the booklets to the miners (R. 22).

c. *Compliance with OPA regulations and safety laws:* As part of their contention that living costs had risen disproportionately to wages, the miners claimed that the company stores were disregarding OPA price ceilings (R. 22). On May 3, Secretary Ickes directed that mine stores comply with these regulations (R. 22). Shortly thereafter, the Secretary conducted a survey of company stores and commissaries to determine their costs and selling prices (R. 22). Pewee furnished certain information in regard thereto as requested, and in addition advised the Secretary that it would "carefully follow" the May 3 directive (R. 22). Also, about 2 months later, Secretary Ickes, in conjunction with his campaign to reduce accidents in the coal fields, instructed the mines to operate in full compliance with state and federal safety laws and regulations (R. 22).

d. *Compliance with WLB order:* On June 7, 1943, concurrently with the return of the miners to work after the second general strike (*supra*, p.

7), the Solid Fuels Administration instructed the Operating Managers to carry into effect WLB's decision of May 25 in regard to increased vacation compensation and refund of occupational charges (*supra*, p. 6), stating that in all other respects the terms and conditions of employment would continue to be those which obtained under the old contracts (R. 23). These were the terms of employment throughout the remainder of the control period (R. 23). On or about June 30, Pewee made the increased vacation payments at a cost of $1,890 over what the old contract would have required, and refunded $351.26 for lamp rentals previously collected (R. 23).

e. *Continuance of six-day week:* As stated above, Pewee had elected, prior to federal control, to incur the extra cost of a six-day week work schedule, as authorized by the February 11, 1943 amendment of the wage contracts (*supra*, fn. 2, p. 4) (R. 23-24). Although the schedule did not result in the anticipated production, Pewee in March 1943 decided to remain on that schedule (R. 24). On May 3, Secretary Ickes directed all mines to operate on the six-day week, stating that OPA had recently granted coal price increases to cover that operation and he intended to recommend rescission thereof as to any mine that failed to comply (R. 23). On two occasions during May, Pewee informed the Solid Fuels Administration that it intended to continue the six-day week "unless con-

ditions beyond our control, such as car shortage, etc., make this impossible" (R. 24).[12]

f. *Furnishing of reports:* Prior to government control, the Solid Fuels Administration, in furtherance of its supply and distribution functions under Executive Order 9332 (3 CFR, Cum. Supp. (1943), p. 1270),[13] had asked each bituminous coal producer to file a weekly card report of its production and running time (R. 24). On May 12, 1943, the mines were sent a form memorandum requesting prompt submission of these reports so that the Solid Fuels Administration would be informed as to the availability of bituminous coal for war needs. (R. 24-25). In order to keep the Government informed regarding work stoppages, their causes and effect on production, the Operating Managers were instructed, beginning May 17, to make daily reports of tonnage and labor force of the previous day, together with figures which would reflect whether the situation was normal (R. 25). In Pewee's area, this information was collected by telephone by the Government's local representative who then transmitted the results to the regional office (R. 25). These calls were made at the ex-

[12] The amendment of February 11, 1943, also authorized holiday work at time and a half, if consented to by the parties locally (R. 24). While the Government asked the mines to maintain operations on 3 holidays during the period here involved, Pewee was affected only by the request in regard to work on Labor Day and the proof does not reveal whether its men worked on that day (R. 24).

[13] "Establishing the Solid Fuels Administration for War," issued April 19, 1943.

pense of the mines, and in Pewee's case, because of its proximity to the points to and from which they were made, the calls involved a cost of approximately 60 cents a day (R. 25).

g. *Release of the mine:* In accordance with his earlier statement (*supra*, p. 7), Secretary Ickes, on July 29, instructed the Operating Managers to furnish information upon which he could make a determination as to the release of their mines (R. 26). In response thereto, Pewee's president wrote on August 6 (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines, if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies.[14]

And on October 4, in response to further requests, respondent's president sent in the requested tonnage figures, with his opinion that (R. 27):

> * * * the productive efficiency at this mine has not been restored and as indicated in other communications our tonnage continues considerably off on account of inefficiency, absenteeism, unfavorable operating conditions, etc.

[14] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

Meanwhile, beginning on August 20, Secretary Ickes, on the basis of figures submitted, continued to release mines, until October 12 when he promulgated an omnibus order releasing all remaining mines including Pewee (R. 25-26).

C. *Pewee's loss during the period of federal control:* It was agreed, and the court found, that respondent suffered a net loss, during the period of Federal control, of $36,128.96 (R. 40), which it claimed as the measure of recovery. The court found (R. 40), however, that the loss was not attributable to any act of the Government, except to the extent of the sum of $2,241.26, which was paid by respondent to its employees as a result of the WLB decision (*supra*, pp. 6, 10, 12-13).[15] The court also found that "no changes were required or made in [respondent's] internal operating meth-

[15] Specifically, the court found that Pewee's tonnage was seriously reduced subsequent to May 1, 1943, by underground physical conditions due to (1) the use of the unconventional method of working the mine "on the advance" rather than "on the retreat," and (2) the taking of excessive amounts of coal from certain of the pillars and room walls, thus weakening the supports and setting in motion a gradual shifting of the mountain top above the mine (R. 30). This movement or "squeeze" finally manifested itself in May 1943, with the result that the roof began collapsing in part of the mine (R. 30-31). Also in July 1943, the mine's main entry was driven into the initial stages of a "fault" or low-coal area (R. 31). After numerous conferences among Pewee's officers (in which government officials did not participate) it was decided to continue trying to work the mine (R. 32-33). But since there was no indication that the fault would disappear, it was decided temporarily to abandon the mine in January 1944 (R. 34, 39). The mine was permanently abandoned a few months thereafter (R. 39).

ods," and its "mining operations subsequent to May 1, 1943 are not shown to have been in any respect different because of Government control" (R. 41).

In its opinion (R. 41-47), the Court of Claims held, first, that "the Government did in fact, as well as in name, take possession of [Pewee's] mine," and that this was a taking under the Fifth Amendment, entitling respondent to just compensation (R. 44-45). Secondly, it refused to award as part of just compensation the major part of the $36,128.96 loss suffered by Pewee during the period of Government control, on the ground that it was not attributable to any act of the Government (R. 46-47).[16] The court, however, referring to *Wheelock Bros., Inc.* v. *United States*, C. Cls. No. 46982 (Nos. 169 and 177, this Term), which it decided on the same day, held that the increased compensation amounting to $2,241.26 (*supra*, p. 12-13, 16) which Secretary Ickes had directed to be paid in accordance with WLB's directive was an extra expense occasioned by the Government's action,

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[16] The court said (R. 46):

> It is not necessary for us to determine what caused the loss, if it is not shown that the Government caused it, but the findings indicate that the loss was caused, not by the Government's seizure, but by bad mining operations, and by reason of the fact that during this period they ran into a "fault" in the coal seam which made operations unprofitable, and, in fact, later caused the abandonment of the mine.
>
> When this fault was discovered [Pewee] made its own determination as to whether or not to continue operations in an effort to get through the fault, without any counsel, advice or directions on the part of [the Government].

and entered its judgment for that amount (R. 48). Judge Madden dissented (R. 47-48).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondent's coal mine had been taken within the meaning of the Fifth Amendment.

2. In holding that respondent was entitled to recover, as a loss occasioned by the Government's actions, the amount of increased wages it was required to pay in accordance with WLB's award.

3. In entering judgment for respondent.

SUMMARY OF ARGUMENT

The Government's position is twofold:—First, respondent's property was not taken in the constitutional sense, and any damage it may have suffered through the take-over of its mining business was the non-compensable consequence of unchallenged regulatory action. Secondly, even if a technical taking occurred, respondent is not entitled to compensation because it suffered no loss by virtue of the take-over.

I

A. Necessary elements of all constitutional takings are (1) an authorized intention on the part of the Government officials to take a recognized property interest from the owner and transfer it to the

United States (as in the normal condemnation or requisition case), or (2) in the absence of such intent, a drastic interference with use and possession of private property, of such character and magnitude that it cannot be accomplished without compensation under the Government's non-eminent domain powers (as in the flooding cases). The aim of our argument on the taking issue is to show—on the basis of the purpose and scope of the take-over, the general orders and proclamations issued, and the specific directives given to respondent—that neither of these conditions is fulfilled here.

B. These were the circumstances of the take-over:—The take-over orders and regulations clearly disclose (1) that the "seizure's" sole purpose was to bring an end to the work stoppage in the coal mining industry, caused by a labor dispute, and to resume the production of coal needed for the war effort, and (2) that there was to be a minimum of interference with the management of the mines. Pursuant to these goals, the Secretary of the Interior appointed respondent's president as Operating Manager, directed him to continue operations, business dealings, and financial transactions as theretofore, and authorized him to take all necessary action (until otherwise ordered). Respondent's officers and employees were to be considered as under private control; it was to remain subject to suit and to all State and Federal laws; all opera-

tions were to be for its own account, until otherwise specifically ordered.

As contemplated by these regulations, no control over respondent's operations was actually exercised, except for directives (1) to comply with the War Labor Board award of increased benefits to the mines, and with OPA price regulations and safety laws, (2) to post placards and distribute booklets, and (3) to furnish certain reports. Respondent's mining operations were not otherwise affected in any way.

C. 1. These unchallenged findings that respondent exercised almost complete control over its operations and business life, together with the terms of the various orders and regulations outlined above, demonstrate that the Government officials never had a present intention to take any property from Pewee and transfer it to the United States. The Executive Order authorized the taking of "possession, *so far as may be necessary or desirable*" (R. 10; italics supplied); and in this case the Secretary took no more than temporary custody for a specific and limited regulatory purpose (*i.e.*, enforcement of the WLB award) leaving title and all other property interests, as well as actual use and possession, in respondent. No attempt was made to employ any of the available eminent domain statutes, and everything that was said in the orders and regulations, or done by the Government during the control period, is fully consist-

ent with the establishment of an operating receivership or conservatorship—a traditional regulatory mechanism. There is no occasion to invoke eminent domain concepts in order to justify or explain the wordings of the take-over orders or the few specific directions issued to respondent.

The President's Executive Order and the Secretary's regulations may have authorized a constitutional taking should control-less-than-taking turn out to be ineffective, but, if so, these orders and regulations were no more than advance warnings or notices of a possible taking, and not present takings in themselves. *Marion & Rye Valley Ry.* v. *United States,* 60 C. Cls. 230, 249-250 (World War I railroad "seizure"). As stated above, it is clear that the Secretary never took any steps to consummate an actual taking of Pewee's mine; such a measure never became "necessary" or "desirable".

2. Official intentions aside, a taking can certainly not be implied from the character or impact of the few actual orders issued by the Government. The directives to comply with safety laws, and to have the company stores abide by OPA price ceilings, added nothing to previous requirements; the same is true of the order to furnish certain reports and information. The six-day week was continued voluntarily and not as a result of the Government directive. The posting of placards and the distribution of booklets helped respondent to resume

operations. The order to comply with the WLB award was fully agreeable to respondent; and, in any event, the directive was merely an additional enforcement device, regulatory in nature, to compel compliance with governmentally established wartime wages.

Not one of these orders, nor all together, resulted in the drastic interference with use and enjoyment of property which is necessary to imply a taking. All of them were well within the Government's regulatory powers, and the degree of regulation they imposed was minor as compared to many other regulatory controls which have been held not to constitute takings. Moreover, a taking cannot be implied where, as here, the claimant plainly gained more from the Government's actions than it lost. *United States* v. *Sponenbarger*, 308 U. S. 256, 266-7.

D. The most appropriate characterization for such a take-over as is involved here and in *Wheelock* (Nos. 169 and 177) is that of operating receivership or conservatorship—non-eminent domain devices long known to American law. Equity courts have employed receiverships to aid enterprises needing outside assistance to continue operations. See, *e.g.*, *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 112. State and federal statutes have provided for governmental conservators to "take possession" of the "business and property" of financial institutions in need of official control. See *e.g.*, *Fahey* v. *Mallonee*, 332 U. S. 245, 250-253. This

receivership analogy, which was publicly advanced in November 1941 during Congressional consideration of take-over legislation, aptly fits the instant "seizures" and every Government action taken during federal control. Recent state take-over statutes are also consistent with this characterization, and there is nothing inconsistent in the terms or the history of the War Labor Disputes Act (passed after the present take-over but prior to that involved in *Wheelock*, Nos. 169 and 177).

E. *United States* v. *United Mine Workers*, 330 U.S. 258, dealt only with the Government-miner relationship for the purposes of the Norris-LaGuardia Act, and expressly did not pass on the relationships of the Government and the operators.

II

Even if there were a technical taking, respondent is not entitled to any compensation, since it has not shown that it suffered a loss. *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U.S. 280, 282. The Court of Claims allowed the amount of the WLB award, but there is no reason to believe that respondent would not gladly have made these payments if the miners had been willing to return without a "seizure". In addition, the take-over clearly gave respondent a substantial net benefit in allowing it to resume operations without capitulating to the miners' full demands, thus permitting it to save the large overhead costs of a idle mine, as well as

probable increased labor costs which would have been incurred if the strike had ended without federal intervention. Pewee's reluctance to have federal control relinquished reflects its appreciation of the benefits it received.

ARGUMENT

This case, together with *United States* v. *Wheelock Bros., Inc.*, and *Wheelock Bros., Inc.* v. *United States*, Nos. 169, 177, arose out of World War II take-overs by the Government of business enterprises essential to the nation's economy and the war effort, solely for the purpose of averting interruptions in production, actual or threatened, due to work stoppages by employees because of wage disputes with their employers. The suits are by the owners or operators of these business enterprises to recover compensation asserted to be due them as a result of the take-overs. The Court of Claims held that they were entitled to judgment against the United States on the ground that the "seizure" of the business enterprises resulted in takings of property for which the Fifth Amendment prescribes the payment of just compensation. The court fixed as the measure of this compensation the increase in wage benefits paid, by direction of the Government, to the employees during the period of federal control, in accordance with an award of the War Labor Board.

The judgments of the Court of Claims, so imposing liability on the Government, rest on doubly

unsound footings. Point I of our Argument deals with the Court's error in holding that there was a Fifth Amendment taking.[17] In Point II, we shall show that, even if there were a technical taking, Pewee was not entitled to any compensation since it suffered no over-all damages.

I

Neither Respondent's Coal Mine nor Its Business Was Taken Within the Meaning of the Fifth Amendment So as to Entitle It to Just Compensation

The Government's principal contention is that there was no taking of respondent's property or business within the meaning of the Fifth Amendment, and that it therefore has no claim to the just compensation which the Constitution requires to be made for such takings. Our effort will be to show, first, that—considering the Government's purpose, the scope and nature of the interference with respondent's business and property, the requirements imposed upon it, as well as the formal documents issued during the take-over—the necessary elements of a constitutional "taking" of "private property" cannot be said to be present here; and, secondly, that what the Government did was no more than an

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[17] We are filing separate briefs in *Pewee* (No. 168) and *Wheelock* (Nos. 169 and 177) in order to avoid confusion, since although the basic questions presented in both cases are the same, the suits arise out of different take-overs, each of which has its own complex of facts.

The present brief contains the main argument on the taking question, and the *Wheelock* brief the main argument on the issue of damages.

exercise of its regulatory powers, which can best be assimilated to the concept of an operating receivership or governmental conservatorship, long known to our law in other fields.

A. *The elements of a constitutional taking*

Federal eminent domain law recognizes three general classes of constitutional takings. The *first* is the traditional exercise of the eminent domain power, in which Government officials (a) intend to take private property for public purposes, under definite and valid statutory authority, (b) carry out the prescribed formal steps, such as the issuance of a requisition declaration or the filing of a court petition and completion of the judicial condemnation process, and also (c) take possession of, and dominion over, the property.[18] The *second* category differs only in that dispossession of the owner is unnecessary to consummate the taking, as under the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a-f, providing for irrevocable vesting of title in the United States upon the filing of a declaration of taking and deposit of the estimated award, even though possession has not yet been surrendered. In both cases, however, it is the admitted

[18] Examples are condemnations of interests in land under the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. 257, requisitions of war materials under the wartime requisitioning statute (Act of October 16, 1941, 55 Stat. 742, as amended, 50 U.S.C. App., 1940 ed., Supp. V, 721), and requisitions of merchant vessels under Section 902 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1242.

purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States.

The *third* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions entail such an actual invasion of property rights that a constitutional taking must be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393, 413; *Block* v. *Hirsh,* 256 U.S. 135, 155-6; *United States* v. *General Motors Corp.,* 323 U.S. 373, 378; *United States* v. *Dickinson,* 331 U.S. 745, 748.[19] But though subjective purpose to "take" is unnecessary in this class, it is an essential prerequisite that the governmental invasion affect a legally recognized "property right", and not merely some other economic interest of the plaintiff's (*United States* v. *Willow River Co.,* 324 U.S. 499, 502; *Bowles* v. *Willingham,* 321 U. S. 503, 517-519), and also that the interference with use or possession be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive

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[19] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 809-810. See also *United States* v. *Causby,* 328 U.S. 256 (taking by flights of governmental aircraft) and *Portsmouth Co.* v. *United States,* 260 U.S. 327 (repeated firings of projectiles over owner's land).

powers. *Penna. Coal. Co.* v. *Mahon, supra; United States* v. *General Motors Corp., supra; United States* v. *Causby,* 328 U.S. 256, 261-3, 264; *United States* v. *Kansas City Ins. Co.,* 339 U.S. 799, 804-808. Where these factors exist and a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as title, an easement, a servitude, or a leasehold. *United States* v. *Causby; supra; United States* v. *Dickinson,* 331 U.S. 745, 748, 751; *United States* v. *Lynah,* 188 U.S. 445, 470-1.

The temporary take-over of respondent's mine does not fall, in our view, into any of these three categories. As the following summary (*infra,* pp. 29-39) and analysis (*infra,* pp. 39-66) of all the steps taken by the Government will show, there was no present intention on the part of Government officials, at any stage, to acquire for the United States a proprietary interest in respondent's property or business; they did not act under any statute authorizing use of the power of eminent domain; and the documents they issued did not purport to take respondent's property in the constitutional sense. The sole aim was to induce the resumption of coal-mining with as little interference with respondent's property or business as possible. And putting official intention aside, it is likewise plain that what occurred was not such an invasion of a recognized property right, beyond any executive or regulatory

powers granted by the Constitution, that a taking must be inferred from the Government's actions themselves. The interference which did occur was minimal and well within the Federal Government's non-eminent domain powers.

B. *The limited purpose and scope of the take-over of respondent's mining business*

1. The Government's "seizure" of the coal mines, including that owned by respondent, was solely for the purpose of bringing about the resumption and continuation of the production of coal, which was essential to the success of our war effort. Since UMWA, of which the vast majority of the coal miners were members, and the operators had been unable to agree on a contract, the wage dispute had been submitted, after repeated requests by the operators, to WLB. The union had refused to appear before WLB, because in its view WLB could not decide the matter equitably (R. 9), and instead had insisted on dealing directly with the operators. On May 1, 1943, when the President issued Executive Order 9340, taking over the mines, the UMWA was demanding on behalf of the miners substantial wage increases or benefits which the operators had refused to grant. In order to exert pressure upon the operators to accede to their demands, the miners were refusing to go into the mines and produce coal. Since virtually all of the bituminous mines in the country were involved in the wage controversy, the

strike affected practically all of the mines and very little coal was being produced. At the time the President acted, the stockpile of coal was decreasing rapidly, and to permit the test of economic strength between the operators and the miners to run its course would have been disastrous to the country as a whole, since the tremendous war effort in which we were then engaged was dependent upon the availability of coal for the production of munitions and other necessary tools for waging war.

The Government undertook to take over the mines solely in the hope and expectation that the miners, who would not work while the operators remained in full control, would in this period of emergency forego their right to strike and work under the auspices of the Government, notwithstanding their dissatisfaction with the terms and conditions of employment. The President's Executive Order 9340, authorizing the Secretary of the Interior to take "possession" of the mines, makes this limited purpose clear. (R. 10-11). The preamble states that inasmuch as the miner's work stoppage will curtail "vitally needed production in the coal mines directly affecting countless war industries and transportation systems dependent upon such mines * * * it has become necessary for the effective prosecution of the war that the coal mines * * * be taken over * * * in order to protect the interests of the nation at war, and the rights of workers to continue at work * * *" (R.

10). The President accordingly directed the Secretary of the Interior "to take immediate possession * * * of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, * * * and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war * * *" (R. 10). "Possession and operation of any mine or mines" was to be "terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program" (R. 11).

In connection with this precise limitation of the "seizure's" goal, the Executive Order made it clear that there was to be a minimum of interference with the management of the mines. The Secretary was authorized and directed to take "possession" of the mines only *"so far as may be necessary or desirable"* (R. 10; italics supplied). He was also specifically instructed to "permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order" (R. 10).

2. These twin presidential directives—to take "possession" for a limited purpose only, and to interfere as little as possible with management—were scrupulously followed at all times during the period of federal control, both in the regulations

issued by the Secretary and in the specific Governmental actions undertaken.

a. In temporarily designating, on May 1, 1943, the chief executive officer of each mining company as "Operating Manager for the United States," Secretary Ickes advised him and all other officers and employees to proceed with the performance of "their usual functions and duties in connection with the operation of the mine" and the production, distribution and sale of the product thereof (R. 12-13). This statement was reaffirmed in paragraph (2) of the Certificate of Appointment of Operating Managers (R. 19-21; *infra*, p. 96), issued on or about May 12 to the executive officers, after receipt of their acceptance of appointment. The Certificate goes on to state in Paragraph (5) that the Operating Manager (R. 20; *infra*, p. 97),

> in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines; and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

Paragraph (6) provides (R. 20; *infra*, p. 98):

> The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enter-

> prise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

And Paragraph (11) authorizes the Operating Manager (R. 21; *infra*, p. 99):

> to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States * * *".

b. The Coal Mines Regulations (*infra*, pp. 100-116), which were issued by the Secretary of the Interior on May 19, 1943 (8 Fed. Reg. 6655), and which superseded all prior orders and regulations to the extent that they were inconsistent with the Regulations (Sec. 3; *infra*, p. 101), specifically declared the primary object of Government possession to be "the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, * * *" (Sec. 4; *infra*, p. 101). Whenever the cooperation of the company and its personnel could

be obtained, "the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of business as a going enterprise, conforming with such directions as the Government may issue" (Sec. 5; *infra*, pp. 101-2). The properties were to be "operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production" (Sec. 5; *infra*, p. 102).

The Operating Manager of each of the mines was ordinarily the "officer of the company formerly in charge of operations * * * who will, * * * during the period of Government control act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company;" he was removable at the request of the company who could nominate a successor (Sec. 15; *infra*, p. 106). The Operating Manager and the other officers and employees of the company, though serving "in full recognition * * * of [their] responsibilities to the Government and subject to all orders and regulations of the Administrator * * * shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control" (Sec. 16; *infra*, p. 107).

Furthermore, the Operating Manager continued "to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority," and was required to obtain the "consent or concurrence" of the company in respect to action in which such special action is normally required; if the company refused to consent, the action in question could be taken only after report to the Administrator and his specific direction (Sec. 16; *infra*, pp. 107-8). He was to perform for his company the ordinary duties of management in accordance with established policies and practices, so far as consistent with the regulations and the instructions and orders of the Administrator and Regional Managers, and to take action through the ordinary officials and either under his customary title and designation or as Operating Manager (Sec. 17; *infra*, pp. 108-9). Except for extraordinary disbursements and expenditures, "ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company" (Sec. 22; *infra*, p. 110). The status of the officers and employees with respect to the company, including that of the Operating Manager, were to continue as under private control; officers and employees were not to be considered employees of the United States (Secs. 16, 23(d); *infra*, pp. 107-8, 111-12). Customary working conditions were to be maintained (Sec. 23(a); *infra*, p. 111). The companies, their personnel and their property,

were "to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies";[20] the companies were required to "meet all Federal, State and local taxes, contributions, and assessments in the customary manner"; and "to remain subject to suit as heretofore" (Sec. 24; *infra*, pp. 112-13). Neither the operation of any mine in the possession of the Government, nor the proceeds, earnings or liabilities of such mine were in any event to be for the account or at the risk or expense of the Government, in the absence of a specific written direction or order by the Administrator to that effect. (Sec. 17, as amended; *infra*, pp. 108, 118). There was nothing in the regulations prohibiting a company from going out of business or abandoning a mine—absent a specific directive to the contrary—and a number of mines were actually shut down during federal control (R. 39).[21]

3. These were the regulations under which Pewee's mine was operated during the period of federal control, and though they permitted affirmative

[20] Section 24(c), *infra*, p. 113, provided that "the possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property."

[21] In the present case, the Court of Claims found that respondent "made its own determination as to whether to continue or discontinue operations, and this without any direction from the [Government] or even without any consultation with it" (R. 41).

Government intervention in the affairs of the mines which were taken over, it is plain on their face that by themselves they did not constitute such intervention, and that little actual control was contemplated. This expectation was more than fulfilled.

Apart from its requests for information relating to the production and availability of coal which the operators were already required to furnish the Solid Fuels Administrator under Executive Order 9332 (8 Fed. Reg. 5335) (*supra*, pp. 14-15), the actions of the Government during the period of control did not, in fact, go beyond the limited purpose of keeping the miners at work, and dealt almost entirely with matters causing dissatisfaction among them. See *supra*, pp. 10-16. Even this intervention was minimal. The company stores were directed to comply with OPA maximum price regulations, which UMWA, as part of its contention that living costs had risen disproportionately to wages, had alleged these stores were ignoring (R. 22). Safety laws were ordered to be obeyed (R. 22). The operators were also instructed to pay the increased—but substantially lower than sought by the miners—benefits to which the War Labor Board on May 25, 1943 (after the "seizure"), found them to be entitled (R. 23). Booklets exhorting the miners to resume work were distributed, and placards calling attention to the take-over were displayed (R. 21-22).

In all other respects, the operation of the mines, once resumed, continued as before the Government had intervened; the court below specifically found that no other control over respondent's operations was in fact exercised (R. 15) and "[Pewee's] mining operations subsequent to May 1, 1943 [when Executive Order 9340 was issued] are not shown to have been in any respect different because of Government control" (R. 41). "Management and personnel performed their customary functions and duties in the regular and normal course of its business; no changes were required or made in its internal operating methods; and its books and records of account were maintained in the same manner" (R. 40-41).[22]

4. Finally, it should be noted that federal control was quickly terminated when the limited purpose

[22] In its opinion, the court below stated (R. 41):

> When the Government took possession it appointed [Pewee's] president as the Operating Manager of the business and instructed him to continue to operate the mine and to sell coal as theretofore, unless otherwise directed. [Pewee] continued operations without any interference on the part of the Government, except in one respect, to be mentioned later, [i.e., payment of the increased wage benefits granted by the WLB]. [Pewee] determined the method of operation, determined whether to continue operations in this place or that, or to discontinue them altogether. [Pewee] sold its coal to whom it pleased and at whatever price it could get for it. It collected for coal sold and put the money in its own treasury.
>
> It did all this without let or hindrance from the Government. It operated its business precisely as it had before the Government took possession of it, except in the one instance referred to above. However, it was at all times subject to Government control and direction.

of the "seizure" was regarded as having been achieved. Beginning on August 16, 1943, the Coal Mines Administration circularized the Operating Managers for information upon which a determination could be made as to the release of their mines, *i.e.*, whether productive efficiency had been restored to the level prevailing prior to May 1, 1943 (R. 25). On the basis of information thus furnished, 58 mines were released on August 20 and 23, and 370 mines were released on September 4 (R. 25). Controls over the remaining mines were terminated on October 12 by an omnibus order, "in accordance with the provisions of the War Labor Disputes Act" (R. 25), *i.e.*, within sixty days after attaining full productivity. Pewee was far from anxious to have federal control relinquished; it appears to have sought an extension rather than a termination of the take-over. See *supra*, pp. 15-16; *infra*, pp. 61-62, 92-93.

C. *The elements of a constitutional taking are not present in this case.*

Viewed in the light of this limited purpose and restricted intervention with actual management and operation, the Government's "seizure" of Pewee's mine does not fit into any of the categories of a constitutional "taking" of "property".

1. *There was no intention to take:* In the first place, the narrow purpose of the take-over, the terms of the Executive Order and the subsidiary

regulations, as well as the limited character of the Government's actions, all indicate that there was no present intention on the part of the Government officials, at any time during the control period, to transfer a property interest from the respondent to the United States.[23]

a. This is certainly not a case like *United States* v. *Westinghouse Co.*, 339 U. S. 261,[24] in which the United States avowedly took a recognized property interest for a temporary period (*e.g.* a leasehold), ousted the occupant from possession, and proceeded to use the premises for its own purposes. Here, it is undeniable that the Government never expressly announced that it was taking title to respondent's property or some lesser property interest, and we believe that no such declaration can be implied from words or circumstances. Executive Order 9340 authorizes the taking of "*possession, so far as may be necessary or desirable*" (R. 10; italics supplied). The Secretary's "Order for Taking Possession" undertook to take only "possession" (R. 12), and Section 5(b) of the Coal Mines Regulations specifically provided that "title to the property remains in the owners thereof," the Govern-

[23] We deal expressly, at pp. 83-86, *infra*, with the Court of Claims' conclusion that if an eminent domain taking were not intended the take-over would be a "pretense and sham" and a "fraud" (R. 44-5).

[24] Or *United States* v. *General Motors Co.*, 323 U.S. 373; *United States* v. *Petty Motors Co.*, 327 U.S. 372; *United States* v. *Kimball Laundry*, 338 U.S. 1.

ment "having temporarily taken possession or custody." *Supra*, p. 34; *infra*, p. 102. This taking of formal "possession" or "custody"—for a temporary period, for a limited purpose, and with an express disavowal of the taking of title—is not equivalent to a declaration that a recognized property interest is being transferred to the United States.

b. This is especially clear because the formal taking of "possession" was coupled with the issuance of orders and regulations showing that the Government did not intend to oust the operators from their possession or to take exclusive possession of all or part of the mining business and property to be operated for the account of the Government.[25] On the contrary, the operators, upon the designation of the president or chief executive officer as "Operating Manager," were left in substantially complete possession of the property to operate the mines for their own account. As we have shown in detail, the Certificate of Appointment of Operating Managers and the Coal Mines Regulations permitted the company to continue (1) to enter into and discharge contracts and other obligations in the ordinary way, (2) to serve customers of their own selection, (3) to effect such

[25] Taking physical possession of each mine not only was deemed unnecessary because of the seizure's limited purposes and anticipated short duration, but was a physical impossibility. The Government did not have the experienced personnel necessary to staff the over 2800 mines "seized" under the Executive Order.

financial transactions as they deemed necessary "utilizing any or all funds due or owing or belonging to the company," (4) to collect and retain the revenues from the business,[26] (5) to effect such changes in the plant, equipment, and capital structure as they saw fit, (6) to remain subject to all state laws,[27] and (7) to be amenable to suit as fully as if government control had not intervened. *Supra*, pp. 32-36; *infra*, pp. 96-137. That the normal functions of management were left to the operators is cogently illustrated in the instant case by the respondent's dealing, without any participation by the Government, with the fault and squeeze which hampered its operations during and after the period of federal control (R. 30-39, 46). *Supra*, pp. 16-17.

c. Further evidence that the executive branch did not view the limited take-over of the coal mines for a restricted purpose as in the nature of a Fifth Amendment taking is the failure to rely on any federal statute implementing the eminent domain power. At the time of the "seizure", Title II of the Second War Powers Act (56 Stat. 176, 177)

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[26] If Pewee's property had been taker, its revenues would have belonged to the Government. *E. I. duPont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462; *Dakota Central Telephone Co.* v. *South Dakota*, 250 U.S. 163, 185. Pewee did not, however, treat the revenues from its business as being received for the Government's account nor was it required to do so.

[27] This, of course, was incompatible with a taking, since state laws would have been inapplicable to federal property. *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U.S. 135; *Missouri, Pacific Railroad Co.* v. *Ault*, 256 U.S. 554; *North Carolina Railroad Co.* v. *Lee*, 260 U.S. 16.

was in effect, empowering the departments and agencies of the Government, upon authorization by the President, "to acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes." This statute authorized temporary takings of "interests in realty normally purchased by private persons". *United States* v. *Westinghouse*, 339 U. S. 261, 262. Nevertheless, the President's authorization to take possession of the coal mines nowhere invoked this or any other statute pertaining to the exercise of the Government's eminent domain power, but, rather, relied generally upon his powers "as President of the United States and Commander-in-Chief of the Army and Navy." (R. 10).[28]

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[28] The pertinence of this provision of the Second War Powers Act, as well as of the concepts of eminent domain, to the coal mine take-overs was specifically questioned in Congress, though there was some difference of views. Senator Connally, the principal proponent of the "seizure" provision which ultimately became Section 3 of the War Labor Disputes Act [which was enacted subsequent to (on June 25, 1943), and in light of, the take-over of the coal mines here involved] said in explanation of his proposal (89 Cong. Rec. 3807) that "there is no explicit and definite provision in any statutory enactment authorizing the taking over of plants on account of labor disturbances. * * * The Second War Powers Act carries a clause with regard to condemnation, under which the Government may take over temporarily any plant or property, but even that does not carry the specific authority". Senator Tydings subsequently proposed an amendment to the bill which became the War Labor Disputes Act for the express purpose of confirming and validating the President's "seizure" of the coal mines (89 Cong. Rec. 3989) since, as Senator Tydings put it, "no one has put his finger on the particular power which authorized the President to seize the coal mines."

d. Added to this omission to invoke condemnation authority must be the significant fact that the close similarity of a take-over for the purpose of ending a labor dispute to the traditional operating receivership or conservatorship—a regulatory rather than an eminent domain mechanism—was then prominent in the thinking of persons in public life. See the discussion *infra*, pp. 77-81. All the general orders, declarations, and regulations issued with respect to the take-

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89 Cong. Rec. 3989. During the debate on that proposal, Senator Taft referred to Title II of the Second War Powers Act as clearly authorizing the President's action. 89 Cong. Rec. 3989, 3991. Senator Tydings, however, disputed the applicability of Title II and stated (89 Cong. Rec. 3990) that the purpose of the Second War Powers Act was "to acquire property which the Government intended to use" but that the take-over of the coal mines "was not to acquire property which the Government intended to use; it was to take over property temporarily, merely as a law and order proposition, until the property seized could be employed in the war effort." Senator Tydings also said (89 Cong. Rec. 3990) that "the Government today is not owning any of these mines, it is not attempting to own them. Already by Executive order they have been restored to their owners. The owners have been told to operate them under the jurisdiction of the National Government. * * * [The Senator from Ohio] knows and I know that there will be no condemnation proceedings filed in this case. He knows and I know that the Government does not want to acquire the coal mines. He knows and I know that the only purpose of the Government's being in the mines now is to establish law and order, so that work may be resumed. * * *"

While Senator Tydings' amendment to the War Labor Disputes bill was rejected (89 Cong. Rec. 3992), the reason was not that it was believed that the President already had the statutory power under the Second War Powers Act, as urged by Senator Taft, but rather that it was thought that enactment of the amendment might give rise to the impression that the President had exceeded his authority. 89 Cong. Rec. 3992 (Senators Connally and Barkley).

over (*supra*, pp. 8-10, 30-6), as well as all the specific actions undertaken (*supra*, pp. 10-16, 36-9; *infra*, pp. 55-62) are fully consistent with this receivership concept. In particular, as we point out more fully below at pp. 71-2, 75-7, each of the few compulsory orders issued by the Government—ordering compliance with the WLB award, as well as with OPA regulations and safety laws; requiring the furnishing of reports—is the type of command which a receiver or conservator could properly promulgate.[29]

For the same reason, it cannot be said that an intention to take is shown by the legend "United States Property" on the placards ordered to be displayed at the mine (R. 21-22) (*supra*, pp. 11-12). This legend would certainly be entirely appropriate if the United States was acting as receiver or conservator of the mine and its business, in aid of the war effort.[30] It would even not be inapt if the Government were merely exercising its war powers to preserve order in the coal mines and to induce the miners to return by seeing that they were granted certain benefits, and chose to consider itself, in its

[29] Even if one puts the receivership analogy aside, these directives as to employee benefits, reports, and compliance with statutes, do not indicate, either by themselves or together with the other circumstances, that the Government intended to exercise its eminent domain powers. See also *infra*, pp. 54-66, 84-5.

[30] The same is true of the provision of the Coal Mines Regulations that the United States' "possessory interest" was "deemed to be protected by the criminal laws protecting United States property". *Infra*, p. 113.

capacity as *parens patriae*, as an official custodian, caretaker, or trustee.

e. It may be true that Executive Order 9340 *authorized* Secretary Ickes to take the mines in the constitutional sense, but it did not authorize or direct that this be done unless it was "necessary or desirable" (R. 10; *supra*, pp. 8, 31). The Secretary's orders and regulations, issued pursuant to the Order, can be read as contemplating the occurrence of such a taking if the Government took certain further steps,[31] but, as we have said (*supra*, pp. 36-7, 40-2, 44-5), it is clear on their face that, in the absence of much more drastic intervention in a company's business than happened here, nothing in those regulations or orders constituted a present "declaration of taking", akin to the formal declaration under the Declaration of Taking Act, 40 U.S.C. 258a-f, which automatically, and without more, passes title to the United States.

If they contemplated eminent domain at all, the Executive Order and the Secretary's orders and regulations constituted no more than formal notification that a taking might occur if that action turned out to be "necessary or desirable", and if

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[31] For instance, the Coal Mines Regulations (*infra*, pp. 102, 107-8, 113-14, 118) contemplated that the existing management might not be utilized (Sections 5, 15(b), 30, 31), that operations might be directed to be for the Government's account (Section 17), and that complete supervision of all operations might be imposed (Section 16).

control-less-than-taking were insufficient. Such advance notice or warning is, of course, not equivalent to the taking itself. *United States* v. *Sponenbarger*, 308 U. S. 256, 267-8; *Danforth* v. *United States*, 308 U. S. 271, 286; *Bauman* v. *Ross*, 167 U. S. 548, 596; *Shoemaker* v. *United States*, 147 U. S. 282, 321; *Willink* v. *United States*, 240 U. S. 572, 579-580.[32]

This was the very core of the decision in *Marion & Rye Valley Ry.* v. *United States*, 60 C. Cls. 230, affirmed, 270 U. S. 280, where in closely analogous circumstances the Court of Claims held that there had been no constitutional taking.[33] In that case, which arose out of Federal control and operation of the railroads during World War I, the President issued a Proclamation in which he announced *inter alia* that "I * * * do hereby * * * take possession, and assume control * * * of * * * every system of transportation" and that "all transportation systems shall conclusively be deemed within the possession and control of [the Director General

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[32] In the ordinary eminent domain proceeding, not under the Declaration of Taking Act, the United States may abandon the attempt to condemn at any time before the actual vesting of title or taking of actual possession, even after judgment confirming the award. *Bauman* v. *Ross*, 167 U.S. 548, 598-9; *Danforth* v. *United States*, 308 U.S. 271, 284.

[33] On appeal, this Court found it unnecessary to pass on this question, since the Court held that "even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss" (270 U. S. at 282). See *infra*, p. 94.

of Railroads] without further act or notice" (60 C. Cls., at 231-234, 232, 234). The Proclamation, moreover, unlike the present Executive Order, expressly provided for the payment of just and reasonable compensation. 60 C. Cls., at 233. The Director General of Railroads issued to the railroads orders reciting that he had "taken possession and assumed control of" the transportation system; that officers, agents and employees of such system "may continue in the performance of their present regular duties"; that accounts of the railroads should be closed as of the beginning date of Federal control and opened as of the next day (60 C. Cls., at 237-238); and that "Every railroad officer and employee is now, in effect, in the service of the United States" (60 C. Cls., at 239). He also ordered a general increase in rates (60 C. Cls., at 241). The Court of Claims found further, as it did here, that (in the words used by this Court in summarizing the findings, 270 U. S. at 282-283):

> [The Director General of Railroads] did not at any time take over the actual possession or operation of the railroad; did not at any time give any specific direction as to its management or operation; and did not at any time interfere in any way with its conduct or activities. The company retained possession and continued in the operation of its railroad throughout the period in question. The railroad was operated during the period exactly as it had been before, without change in the manner, method or pur-

> pose of operation. * * * The character of the traffic remained the same. Nothing appears to have been done by the Director General which could have affected the volume or profitableness of the traffic or have increased the requirements for maintenance or depreciation; and apparently it retained its earnings; expended the same as it saw fit; and, without accounting to the Government, devoted the net operating income to the company's use.

Based on these findings, the court concluded that there had been no taking, since, it held (60 C. Cls., at 249-250) there was an absence of the evidence necessary

> to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken. * * * A mere declaration of an intention to take cannot constitute a taking. The proclamation of the President setting forth that on some future day he will take over the property of certain owners does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property as that the owner is deprived of, or circumscribed in some way, in the use and

enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished it cannot be said that there is a taking within the meaning of the Constitution.

By the same token, the orders and regulations issued here—which were similar to but less far-reaching than those in the *Marion & Rye Valley* case—cannot be treated, in themselves, as declarations of taking. At most, they were declarations of an intention to take in the future should the circumstances be deemed to require such a step. As the situation actually developed, however, use of the eminent domain power became unnecessary and undesirable. The few specific regulatory directives issued by the Secretary to respondent (*supra*, pp. 11-15, 37, 44-5; *infra*, pp. 55-66) obviously did not indicate any intention to exercise whatever latent or reserve eminent domain powers he may have had.

f. That governmental orders and regulations of this type did not result in a constitutional taking of the coal operators' property has already been suggested, in other contexts, by a number of lower courts. *Warner Coal Corp.* v. *Constanzo Transportation Co.*, 144 F. 2d 589, 593-4 (C. A. 4), certiorari denied, 323 U. S. 791; *Glen Alden Coal Co.* v. *N. L. R. B.*, 141 F. 2d 47, 51-2 (C. A. 3); *Consagra Coal Co.* v. *Borough of Blakely*, 55 F. Supp. 76 (M.D. Pa.); *Stanton* v. *Ruthbell Coal Co.*, 127

W. Va. 685, 694-698.[34] Thus, in *Warner Coal Corp.* v. *Constanzo Transportation Co., supra*, which was a proceeding against a "seized" coal mine for an adjudication of bankruptcy, the Court of Appeals for the Fourth Circuit rejected the company's contention that since its mine "had been taken over" by the United States, such an adjudication was improper. The court briefly reviewed the Executive Order and the Coal Mine Regulations, and commented (114 F. 2d at 593-594):

> Under this order and regulation there was no interference with the operations of the Coal Company's mines. Its president was named operating manager for the United States and the business proceeded as usual * * *.

And in *Stanton* v. *Ruthbell Coal Co., supra*, an action for wrongful death of a miner which the company sought to defend on the ground that it was not liable since the death occurred during Government control, the West Virginia Supreme Court of Appeals, following a full review of the

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[34] *Jones & Laughlin Steel Corp.* v. *United Mine Workers*, 159 F. 2d 18 (C. A. D. C.), does not hold to the contrary. There, the court, in holding that the owner of the mine could not protest any changes in the terms and conditions of employment established by the Government for the period of the "seizure" (a take-over subsequent to the one involved here), stated that the owner "is privileged at any time to withdraw from participation in the program established [by the Government] and stand on its constitutional right to just compensation," by having the business operated for the Government's account (159 F. 2d, at 20-21).

pertinent orders and regulations, held the defense invalid, and noted (127 W. Va. at 694-695, 698):

> The Regulations, in our opinion, clearly indicate that, except and only if necessary to effect the primary object of Government control, such control would be nominal. * * *
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> * * * in the instant case, where defendant company was operating a coal mine, subject to Government control on defendant's own account and for its own profit, it should not be relieved from liability for the negligence of its officers and agents in the operation of its mine. * * * [35]

g. If, despite all these considerations, it be thought that some sort of compulsory taking was intended by the Government officials, than we urge that the "taking" was not of a "property right" which must be recognized under the Fifth Amendment. The Government took possession only to the extent necessary to provide an additional basis for urging the miners to resume the production of coal

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[35] In the *Stanton* case, as well as *Glen Alden Coal Co.* v. *N. L. R. B.*, *supra*, the courts distinguished the instant situation from the Government's operation of the railroads in World War I by pointing out that there, as was stated in *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554, 557, "the carrier companies were completely separated from the control and management of their systems. Managing officials were 'required to sever their relations with the particular companies and to become exclusive representatives of the United States Railroad Administration'. * * * The railway employees were under its direction and were in no way controlled by their former employers."

and to assure that, during the period of federal control, production would continue. In *United States* v. *United Mine Workers*, 330 U.S. 258, where the Government had not only "seized" the mines but had also entered into the Krug-Lewis Agreement with the miners providing for substantial employee benefits, this Court described the situation as one where "the Government, in order to maintain production and to accomplish the purposes of the seizure, has substituted itself for the private employer in dealing with those matters which formerly were the subject of collective bargaining between the union and the operators." 330 U.S., at 287. If anything was intended to be taken in the constitutional sense, it was only this right of respondent, as an employer, *vis à vis* its employees. But though the operators may have an economic interest in dealing with their miners, "not all economic interests are 'property rights'" (*United States* v. *Willow River Co.*, 324 U.S. 499, 502-3), and the only protected property rights are those "susceptible of pecuniary compensation, within the meaning of the constitution". *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. 9, 20 (C.C.D. N.J.), appeal dismissed, 140 U. S. 699. Freedom to set all the terms and conditions of employment for one's employees is not an absolute right protected against Government control or supervision, and payment need not be made if a Government agency is established to take over this function, in part, from the

employer. The National Labor Relations and the Fair Labor Standards Acts are proof enough of this proposition. If Congress had established another method for enforcing WLB awards, such as the injunction process or a cease-and-desist order, the employers could certainly not complain of its validity or obtain compensation because of its exercise. See *infra*, p. 58 *et seq.* They should have no greater right because the same regulation is undertaken in the form of a "taking" of their interest in dealing with their employees.[36]

2. *There was no taking implied by law from the government's actions:* The same conclusion must be reached if the Government officials' intention is put aside, and their actions considered alone. Whatever interference there may have been with respondent's property or business during federal control, it is plain that it did not reach the "certain magnitude" which calls for an exercise of the eminent domain power and payment of compensation to sustain it. *Penna. Coal Co.* v. *Mahon*, 260 U.S. 393, 413; cf. *Block* v. *Hirsh*, 256 U.S. 135, 155-6.[37] Detailed examination of the several ac-

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[36] In addition, there is nothing to show that respondent could not have gone out of business, even during the period of federal control, if it preferred to take that step rather than comply with the WLB award. Respondent, of course, was happy to comply. *Supra*, pp. 15-16; *infra*, pp. 61-2, 90-1.

[37] The other leading cases in this Court applying this principle are the flooding cases (e.g., *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 177-181; *United States* v. *Lynah*, 188 U.S. 445, 468-471; *United States* v. *Kansas City Ins. Co.*, 339 U.S.

tions taken by the Government during the "seizure" will demonstrate (a) that those instances of federal intervention which had any effect occasioned only comparatively minor interference, (b) that all the specific directives issued would be constitutionally valid under the Government's noneminent domain powers, and (c) that, on balance, the Federal Government's intervention was beneficial, rather than harmful, to respondent.

a. *The Government's directives occasioned only minor interference or imposed no additional obligations.* Since the Court of Claims has found that no control over respondent's operations was in fact exercised, with the exception of a few directives (R. 15, 40-1), we turn to those specific requirements.[38]

(1). Quite plainly, the lesser directives issued by the Secretary of the Interior were neither intended to, nor did they in fact, substantially interfere with the management and operation of the mines, or impose serious new and additional requirements. The Secretary's "Order for Taking Possession," required the operators to fly the American flag over

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799, 809-811); *Portsmouth Co.* v. *United States*, 260 U.S. 327; and *United States* v. *Causby*, 328 U.S. 256.

[38] Except for the specific directives treated in the following discussion, the terms of the Executive Order, and the Secretary's orders and regulations, imposed no requirements upon respondent, and, obviously, could not, in and of themselves, constitute any interference with respondent's use and possession of its property and business. See also the Government's Brief in *Wheelock*, Nos. 169 and 177, at pp. 39-40.

their property and to post the notice of taking possession on the premises of the mine (R. 12). Subsequently, they were also required to distribute booklets relating to the Government seizure to their employee miners (R. 22). It is difficult to see how these requirements encumbered or interfered, substantially or otherwise, with respondent's mining operations. On the contrary, it would seem that respondent's operations were greatly helped by compliance with these requirements for by apprizing the miners of the government's "seizure", they aided in exercising the desired pressure on the miners to return to the mines.

(2). The directives requiring that company stores reduce their prices to OPA price ceilings (R. 22), and that the management operate in compliance with state and federal safety laws (R. 22), imposed no additional burdens on respondent. The company stores, together with all others engaged in the business of selling, were, prior to the "seizure" and independently of the Secretary's directives, required to conform to the ceiling prices set by OPA. Similarly, the operators were under a duty to comply with the state and federal safety laws. The Secretary's directive in these respects, accordingly, was clearly merely precatory and added nothing to the obligations already imposed on the operators.

(3). The requirement that the Solid Fuels Administration be furnished weekly and (subse-

quently) daily tonnage and labor figures was of a like nature, for, independently of the seizure, the operators were subject to the regulatory powers vested in Secretary Ickes as Solid Fuels Administrator for War under Executive Order 9332 (8 Fed. Reg. 5355), issued April 19, 1943. That order, included, *inter alia,* authority to issue and enforce "directives" with respect to the production and allocation of coal, to recommend OPA revisions of the maximum prices therefor, and to require that the mining companies furnish any information and data needed to effectuate the purpose of the order. Sometime prior to the take-over, the Solid Fuels Administration had requested the operators to send in weekly reports as to production and running time (R. 24). The renewal of this requirement after the "seizure" (R. 24) and the subsequent request that more detailed reports be made daily (R. 25) clearly fell within the ambit of Order 9332 and imposed no additional burden resulting from the "seizure."

(4). Examination of the circumstances relating to the directive with regard to the 6-day week indicates that it exerted no compulsion on respondent. Pewee had been operating on the 6-day week since the summer of 1941 and had elected to continue on that basis, despite the increased cost, in February 1943, when the industry in general shifted to that schedule (R. 24). It was operating on a 6-day week

at the time of Secretary Ickes' directive, and thereafter twice informed the Government that it intended to continue that practice "unless conditions beyond our control * * * make this impossible" (R. 24). Thus, respondent evidenced a firm resolve to continue on the 6-day week, both before and after the Secretary's directive, a resolve which in no way emanated or resulted from the existence of government control.[39]

(5). Finally, the directive of the Secretary of the Interior to the operators, including respondent, that they pay the increased wage benefits to which WLB, by its order of May 25, 1943 (R. 16), found the miners entitled, did not, of itself, result in any drastic new interference with respondent's operations, for even apart from the Secretary's requirement, the operators were under pressure, if not a full-fledged legal obligation, to comply with the WLB's directives. A national no-strike no-lockout policy had been accepted and promulgated in December 1941, and the WLB acted under presidential orders to "finally determine" unresolved labor disputes which might otherwise have caused a disruption of war production. Executive Order 9017, 7 Fed. Reg. 237, 3 CFR, Cum. Supp., p. 1075. It

[39] Although there had been an instruction to keep the company's books and records in such manner that the control period would be separate (R. 21), this instruction apparently amounted to nothing, for Pewee's books and records (as well as its accounts, including bank accounts) were maintained during government control without change, exactly as they had been maintained theretofore (R. 41).

was also endowed, with respect to wages, with the President's authority under the Economic Stabilization Act of October 2, 1942 (56 Stat. 765). See Executive Order 9250, 7 Fed. Reg. 7871, 3 CFR, Cum. Supp., p. 1213. The Board early took the position "that its decisions are directive orders and not recommendations" (Morse, *The National War Labor Board, Its Powers and Duties* (1942) 22 Oreg. L. Rev. 1, 39), and they had a special status and force of their own. See Morse, *op. cit., supra,* at 36-44; Hays, *The National War Labor Board and Collective Bargaining* (1944) 44 Col. L. Rev. 409.

The WLB directives, in fixing wages, thus paralleled in the wage field (though with less compulsive effect) the price ceilings administered by the Office of Price Administration under the Emergency Price Control Act (56 Stat. 23, as amended, 50 U.S.C. App. 901 *et seq.*), which was another phase of the wartime anti-inflation program. It is settled that these maximum prices did not involve a Fifth Amendment taking, but rather constituted valid regulation under the war power. *Bowles* v. *Willingham*, 321 U. S. 503.[40] WLB orders were also akin to the controls over wages and hours of employees exercised by the Government under the Fair Labor Standards Act of 1938 (52 Stat.

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[40] As in the price control situation, an employer certainly had the choice, if he did not want to pay wages in accordance with a WLB's order, to withdraw from business.

1060, as amended, 29 U.S.C. 201 *et seq.*) as well as to the controls over an employer's relations with his workers imposed by virtue of the National Labor Relations Act (49 Stat. 449, as amended, 29 U. S. C. 141 *et seq.*) It is likewise settled that these controls involve no more than regulation under the commerce power. See *United States* v. *Darby*, 312 U. S. 100; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. *A fortiori*, WLB's wage and benefit determination could impose no more than a regulatory burden upon the operators, which burden, in and of itself, plainly did not involve a Fifth Amendment taking.

The Secretary's directive to comply with the WLB's award did not transform this exercise of non-eminent domain powers into a constitutional taking. That directive, together with the "seizure," were sanctions invoked by the Government to secure compliance with WLB's award, comparable to the judicial sanctions which Congress had made available to the agencies charged with the administration of the regulatory statutes cited above. In the case of the WLB, it was thought that, in view of the emergency character of its determinations, judicial sanctions would hinder, rather than aid, the securing of compliance, and consequently it was considered more desirable to leave enforcement to other sanctions.[41] The methods used to obtain

[41] The bill, which was enacted as the War Labor Disputes Act, giving statutory foundation to WLB provided, as it went

compliance with WLB directives consisted primarily of persuasion, "show cause" hearings, withdrawal of benefits and privileges under Executive Order 9370 (8 Fed. Reg. 11463).[42] 1 Termination Report of National War Labor Board, pp. 416-419. As a last resort, WLB could, and in some instances did, refer a non-compliance case to the President or his representative for such action as he might deem appropriate. *Ibid* p. 420. When he deemed it appropriate, the President, as in the instant case, directed the take-over of the plant in order to make sure that WLB's award would be accepted. So viewed, the President's "seizure" in this case and the Secretary's order to pay the increased benefits were simply additional administrative sanctions for securing compliance with WLB's award, and, accordingly, no more involved a "taking" of "pri-

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into conference, for judicial review and enforcement of WLB's orders. This provision was, however, deleted in conference in deference to the request of WLB's chairman, 89 Cong. Rec. 5794-5, 5754-5, 5791, 5812. See 1 Termination Report of National War Labor Board, pp. 58-59.

[42] Executive Order 9370, issued August 16, 1943, authorized the Director of Economic Stabilization to direct the withholding or withdrawal from an employer who did not comply with a WLB award of "any priorities, benefits or privileges extended, or contracts entered into, by executive action of the Government" until compliance had been effectuated. The Order also authorized the withholding from non-complying union of "any benefits, privileges or rights accruing to it under the terms or conditions of employment," and directed as to non-complying individuals "the entry of appropriate orders relating to the modification or cancellation of draft deferments or employment privileges, or both." (This Executive Order was construed by the Director of Economic Stabilization to apply only to WLB orders issued pursuant to the War Labor Disputes Act of June 25, 1943. Accordingly, it was inapplicable in *Pewee's* case, but applied to *Wheelock's*.)

vate property" than do the judicial sanctions available to aid other valid regulatory controls which could constitutionally have been employed here if Congress had desired.

Moreover, the facts of the instant take-over demonstrate that far from being an unacceptable burden imposed by the government on respondent, the Secretary's directive to comply with the WLB award was gladly and voluntarily followed. The coal mines were seized because of the refusal of UMWA to comply with, or accept, WLB's procedures and award. The wage dispute between the operators and the miners was submitted to the WLB only after the operators had made repeated requests that the dispute be so handled (R. 5-7). The operators, unlike the miners who refused even to attend, participated actively in the WLB proceedings, both before and after the seizure (R. 7, 16). Not only the procedure but the result met with the operators' approval for the WLB's award was but a small fraction of the aggregate wage demand being pressed by UMWA, which, according to the operators' representatives, amounted to more than $5.00 per day per man. In contrast to the operators, UMWA not only failed to appear before the WLB but initially rejected WLB's award as constituting virtually no settlement at all of its demands, and it finally accepted the award only because of the "seizure" and pressure from the Government. Respondent, on the other hand, was

happy to continue compliance with the award, and even sought continuance of the federal control which required it to comply (R. 26-7). In these circumstances, the Secretary's directive to the operators to pay the increase, which was agreeable to them, can hardly be termed a serious restriction imposed upon them against their will. See also *infra*, pp. 66-8, 89-94.

(6) The foregoing summarizes the ways in which government control affirmatively touched upon Pewee's affairs. Even without considering the Federal Government's established power to impose regulations of this type without compensation, it is plain that the Secretary's directives did not cause any substantial injury to respondent. Not one of them had, or could have had, any serious connection with the common and necessary use of respondent's property (*i.e.*, the production of bituminous coal), nor could any of them, or all of them together, have seriously interrupted that use, served to deprive respondent of its possession, control, and operation of the property, or constituted a direct and immediate interference with the use and enjoyment of its business property, tangible or intangible. On the contrary, the court below specifically found that "[Pewee's] mining operations subsequent to May 1, 1943 are not shown to have been in any respect different because of Government control" (R. 41).

b. *The directives were well within the Government's regulatory powers.* Furthermore, as we have already suggested with respect to the order to comply with the WLB award, it is indisputable that to the extent that these directives had any effect upon respondent they did no more than impose a minor degree of regulation, comparable to, but less severe than, many other instances of federal regulatory control, particularly during wartime. The courts have refused to find a "taking" with respect to governmental controls of a far more drastic nature than anything here involved. For example, federal regulation of the price which a company may charge for its products or service is not a taking (*Morrisdale Coal Co.* v. *United States*, 259 U.S. 188; *Highland* v. *Russell Car Co.*, 279 U.S. 253; *E. I. duPont de Nemours & Co.* v. *Hughes*, 50 F. 2d 821 (C. A. 3); cf. *Tagg Bros.* v. *United States*, 280 U. S. 420; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569-570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392-396), nor is regulation of the rate at which an owner may rent his property, even though it prevents his earning a fair return on the property's value (*Bowles* v. *Willingham*, 321 U. S. 503, 516-517; *Snyder* v. *United States*, 113 C. Cls. 61, certiorari denied, 337 U. S. 931). Similarly, it is not a taking for the Government to restrict the right to earn profits in wartime (*Lichter* v. *United States*, 334 U. S. 742, 787); to deprive an owner of the benefits

of certain valuable property rights (*Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U. S. 467; *Georgia Hardwood Lumber Co.* v. *United States*, 111 C. Cls. 621); to reduce the value of a business by prohibiting the sale of an otherwise lawful commodity (*Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146; *Mugler* v. *Kansas*, 123 U. S. 623); to cause a company real and substantial damages during wartime by depriving it of materials needed to continue in business (*St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U. S. 815); or to order the company to close down its operation because of war needs (*Oro Fina Consolidated Mines, Inc.* v. *United States*, C. Cls. No. 49486, decided October 2, 1950).

It should also be noted that the coal mining companies were subject to far more comprehensive control under the Bituminous Coal Act of 1937 (50 Stat. 72) than are here involved, and these controls were never regarded as resulting in a Fifth Amendment taking.[43] Under the Bituminous Coal Act, the Government prescribed minimum prices at which coal could be sold. The Government regulated the production practices of the mines in certain respects. It prescribed detailed rules governing the

[43] As pointed out, *supra*, pp. 56-7, the mining companies were, prior to and concurrently with the "seizure," subject to various controls exercised by Secretary Ickes as Solid Fuels Administrator under Executive Order 9332 (8 Fed. Reg. 5355).

marketing of its coal, under which there was surveillance of such matters as the discount and payment terms the mining companies gave their customers. The operators were required to maintain certain records in a specified manner, to file copies of all invoices concurrently as rendered to their customers, and to submit various reports, such as reports showing their monthly costs, tonnage, and realization. Moreover, the mining companies were visited from time to time by a Bituminous Coal Division employee who made a spot check as to compliance. Although an operator could have declined to participate in this regulatory scheme, it would have been subject to the onerous sanction of a 19½ percent tax on its coal sales (violation of the Act and exclusion from the plan on that account brought the same result), as opposed to the cent-a-ton excise tax it paid as a participant.

These instances of federal regulatory control, all of which have been held to fall short of a taking, are far more penetrating than the minor restrictions imposed upon respondent. Likewise, the interference with possession and the controls normally imposed in an operating receivership or conservatorship are more severe and all-inclusive, and such possession and control has never been regarded as constituting a Fifth Amendment taking. See *infra*, pp. 68-86. If respondent suffered injury because of the Secretary's directives, its damage was no greater than that which can be validly inflicted by

these accepted exercises of a government's non-eminent domain powers.

c. *Respondent gained more than it could have lost on account of the Government's actions.* A further significant reason why there was no constitutional taking is that such a taking will not inferred from government action "that does little injury in comparison with far greater benefits conferred." *United States* v. *Sponenbarger*, 308 U.S. 256, 266-7. In the *Sponenbarger* case, a landowner whose lands were to be used as a floodway in connection with a project to control the damage caused by the floodings of the Mississippi River, claimed entitlement to just compensation. The Court noted, however, that other lands of the respondent would be protected as a result of the project and held that in these circumstances the far-reaching benefits which respondent's lands would enjoy under the project precluded a holding that respondent's property had been taken (308 U.S. at 266-267):

> The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner. But if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty. Such activities in substance take nothing from the landowner.

Similarly, in the instant case, whatever losses Pewee sustained were more than counter-balanced by the substantial benefits which the Government's actions conferred upon it. The Court of Claims found that the sole expense incurred by respondent as a result of these actions during the 5½ month period of federal control (May 1, 1943, to October 12, 1943) was the increased wage benefits of $2,241.26, or about $15 per miner,[44] paid during that period. More than offsetting this slight expense were the substantial benefits received by respondent as a result of the Government's "seizure" and its specific directives:—*i.e.*, return of the miners to work and ending of a burdensome strike; payment of far less in wages and benefits than the miners' union demanded and would have continued to demand had there been no take-over; continued production of coal; saving of the large costs of maintaining an idle mine. (For more detailed discussion of the benefits gained by respondent, see Point II, *infra*, pp. 89-94). "Under these circumstances, respondent's [property] has not been taken within the meaning of the Fifth Amendment." *United States* v. *Sponenbarger, supra*, at 267.

D. *The take-over was equivalent to an operating receivership or conservatorship.*

That the "seizure" of the coal mines was not a Fifth Amendment taking of private property

[44] Based on the employment of 150 miners. See *supra*, p. 4.

becomes even clearer when it is compared with the operating receiverships or conservatorships which have traditionally been used to keep businesses in operation. The limited purpose for which the Government seized the coal mines, *i.e.*, as a means of bringing about the resumption of coal production after a strike, taken together with the fact that the Government's intervention was limited to employee matters and that in all other respects the mines, once production was resumed, were operated by and for the account of the operators, strongly suggest that the "possession" of the Government was equivalent to that of a receiver or conservator.

1. a. A receiver is frequently appointed to take possession and operate a business enterprise which for various reasons is not in a position to continue operations without outside assistance. See e.g., *Dodge* v. *Woolsey*, 18 How. 331, 341-4; *Saltz* v. *Saltz Bros.*, 84 F. 2d 246 (C.A.D.C.); *Burnrite Coal Briquette Co.* v. *Riggs*, 274 U.S. 208; *In re Cleveland Discount Co.*, 5 F. 2d 846 (N.D.Ohio).[45] This is particularly true where the

[45] The grounds may be, for example, the pressing demands of creditors, a claim by minority stockholders of mismanagement, inability of partners or joint owners to agree upon the business' operations, or serious financial embarrassment. See 1 Clark, *A Treatise on the Law and Practice of Receivers* (2d ed. 1929), Sec. 46(a) (Court Appointing Receiver under General Equitable Powers), Sec. 49 (Rules Governing Appointment of Receiver), Sec. 53 (Appointment Discretionary with the Court); 2 Clark, *supra*, Sec. 702 (Federal Courts Appointing Receivers of Corporations), Sec. 747

enterprise involved is a public utility whose continued operation is necessary in order that the public be served. *Re Metropolitan Railway Receivership*, 208 U.S. 90, 112; *Sage* v. *Memphis & Little Rock Railroad Co.*, 125 U.S. 361; *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 216 Fed. 458, 462 (C.A. 2), 225 Fed. 734, 735 (C.A. 2).

Upon his appointment, the receiver takes possession of the business, including all pertinent real and personal property, in order to "preserve, manage, operate and control the same" for benefit of the party ultimately proved to be entitled, usually the owners and the creditors. *Re Metropolitan Railway Receivership, supra*, at 95. *Quincy Railroad Co.* v. *Humphreys*, 145 U.S. 82, 97; *Chicago Union Bank* v. *Kansas City Bank*, 136 U.S. 223, 236. He operates the business himself, or supervises its activities when they are carried on by others. His possession and control are terminated as soon as reasonably proper,—ordinarily, upon the resumption of normal conditions—at which time possession of the enterprise is returned to the owners. *Re Metropolitan Railway Receivership, supra*, at 112.

b. The resemblance of the present take-over to such an operating receivership is manifest, and there is no reason why the concept cannot be extended to these circumstances. The coal strike pre-

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(Grounds for Appointment of Receiver in Stockholders' Suits), Sec. 908 (Appointment of Receiver in Building and Loan Associations).

sented the Government with an emergency situation which threatened the entire war effort. The most effective remedy which seemed available was to take temporary possession of the mines for the limited purpose of ending the stoppage in production which had resulted, and to ensure continued war production. Such a purpose is obviously of far greater importance than that for which an operating receivership is customarily created, though it is not different in kind. The creation of a receivership to take possession, manage and control property is regarded as a drastic remedy not lightly to be invoked, but as this Court said, in approving the receivership of the New York City street railway system involved in the leading case of *Re Metropolitan Railway Receivership, supra* (208 U. S. at 112):

> There are cases—and the one in question seems a very strong instance—where, in order to preserve the property for all interests, it is a necessity to resort to such a remedy. A refusal to appoint a receiver would have led in this instance almost inevitably to a very large and useless sacrifice in value of a great property, operated as one system through the various streets of a populous city, and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims, and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives.

Significant as were the considerations on the basis of which this Court approved that receivership, they are, as pointed out by Under Secretary Patterson (*infra*, p. 78), of trifling moment compared to the importance to the nation of uninterrupted production in time of a national emergency.

The take-over is comparable to a receivership not only in goal but also in form. As far as the critical language is concerned, Executive Order 9340 is, for all practical purposes, a replica of an operating receivership's authorization; the order directs the Secretary of the Interior "to take immediate possession, so far as may be necessary or desirable, of any and all mines * * * together with any and all real * * * property, [etc.] * * * and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war * * *." The Secretary's supervision and control over the mines certainly did not exceed that of a receiver. As in a receivership, the business continued to be operated for the account of the owners, and the Government retained control of the property only until it was clear that full production was again attained. If anything, the coal mine "seizure" falls short of an operating receivership, rather than going beyond it. The operating receiver not only takes physical possession of the property but he actively manages and operates the property during the period of the receivership. On the other hand, the

Government took only token possession of the mines, at most, and it did not interfere with the general management or operation.[46]

2. a. Perhaps an even more striking and appropriate analogy is that to a conservatorship in the banking field, for, like the Secretary of the Interior in this case, such a conservator is normally a Government administrative official. Both the federal and state governments have for many years provided for the appointment of conservators for banks, savings and loan associations, and other financial institutions, who take possession

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[46] One district court has appointed an operating receiver in order to restore service on a struck railroad. *Farmer's Grain Co.* v. *Toledo, P. & W. R. R.*, 66 F. Supp. 845 (S.D. Ill.), reversed, 158 F. 2d 109 (C.A. 7), certiorari granted, 330 U. S. 816, reversed for mootness, 332 U. S. 748. In that case, the Government had seized the railroad in 1942 because a wage dispute threatened its operations and a Federal Manager had profitably operated the property for the account of the owners until 1945 when the railroad was returned to its corporate management. Upon the release of federal control, however, the workers went on strike again because they were unable to agree with the management as to the terms and conditions of employment, and as a result the railroad ceased to function. Thereafter, several shippers, complaining of the lack of service, instituted proceedings, seeking, among other things, the appointment of an operating receiver as an efficient and effective remedy for restoring service on the railroad. The district court agreed with the shippers and appointed a receiver to do virtually the same things as the Federal Manager previously had done with reference to the same railroad and as the President directed the Secretary of the Interior to do in the present case, if necessary or desirable (66 F. Supp., at 856). The court of appeals' reversal of this action of the district court was based on the ground that the courts may appoint receivers only as an incident to other relief. 158 F. 2d 109, 116. That restriction would not, of course, apply to action by the legislative or executive branches, if properly authorized.

and control in order to operate for the benefit of depositors and creditors. See *Fahey* v. *Mallonee*, 332 U.S. 245, 250-253.

The chief federal statute is Section 203 of the Bank Conservation Act of March 9, 1933 c. 1, 48 Stat. 2, 12 U.S.C. 203. That provision authorizes the Comptroller of the Currency, "whenever he shall deem it necessary in order to conserve the assets of any [national] bank for the benefit of the depositors and other creditors thereof," to appoint a "conservator for such bank." Under the Comptroller's direction, the conservator is to "take possession" of the bank and its property "and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law." The purpose of this Act was "to enable the Comptroller to appoint conservators rather than receivers where, in his judgment, there was a prospect that the bank of which a conservator should be appointed might, under his direction and control, later reopen and resume its corporate functions." *Davis Trust Co.* v. *Hardee*, 85 F. 2d 571, 572 (C.A. D.C.). The conservator's appointment is the "equivalent of the appointment of a receiver of a corporation with leave to continue the business * * *." *Smith* v. *Witherow*, 102 F. 2d 638, 642 (C.A. 3). The validity of the provision has been expressly upheld. *Smith* v. *Witherow, supra.* Similar federal statutes are the Banking Act of 1933, Sec. 31, 48

Stat. 162, 194, 12 U.S.C. 71a, the National Housing Act, Secs. 306, 406, 48 Stat. 1246, 1255, 1259, 12 U.S.C. 1721, 1729, and Sec. 5(d) of the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. 1464 (involved in *Fahey* v. *Mallonee, supra*).

Many states also authorize the state official in charge of banking affairs to "take possession", in specific circumstances, of the "business and property" of a state financial institution, or to appoint a conservator to operate it. See *Fahey* v. *Mallonee, supra,* at 253, fn. 2, and Brief for Appellants in that case (Oct. T. 1946 No. 687), at pp. 68-72, 120-126.[47]

Such possession may usually be taken, under both federal and the state statutes, for a variety of reasons:—violation by the institution of basic provisions of statute or charter; need to conserve assets in order to protect shareholders and creditors from loss; threat of insolvency; actual insolvency; unsound, unsafe, or unlawful operation; incompetency, fraud, recklessness of management; operations hazardous or injurious to creditors or

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[47] *E.g.*, the *New York Banking Law*, section 606, provides for the superintendent of banking to "forthwith take possession of the business and property of any banking organization whenever it shall appear that such banking organization" has done any of ten specified things. In Massachusetts, the commissioner of banks "may take possession forthwith of the property and business" of the bank. *Annotated Laws of Mass.*, Vol. 5, ch. 167, sec. 22. In California, the commissioner "may forthwith demand and take possession of the property, business and assets" of building and loan associations falling within the specified classes. *Deering's California General Laws*, Vol. 1, Act 986, sec. 13.11.

the public; refusal to obey a valid order issued by the supervisory official. See Brief for Appellants in the *Fahey* case, *supra*, at 64-66, 69-71, 111-112, 120-126.[48]

b. Except that it is much less severe in its incidence, the instant take-over does not differ in form or in substance from such a conservatorship. In both cases, the one who takes possession is an executive or administrative official, acting on behalf of the government and the public. He takes "possession" of the "business", "property", and "assets". The operation continues for the benefit and account of owners and creditors, and in their interest as well as that of the general public, and not for the government's pecuniary interest. The taking of possession is temporary, and control is returned after the situation causing the take-over has been corrected or adjusted. In their different spheres, the reasons for taking possession are quite comparable:—in the one case, preservation of the safety and standing of a bank as an operating institution; in the other, maintenance of labor peace and continued production in a vital wartime industry.

It follows, we believe, that the mine "seizure" can properly be classed as an executive conserva-

[48] Comparable control and supervision may usually be exercised over insurance companies. See Patterson, *The Insurance Commissioner in the United States* (1927) 94-5, 437-440. The administrative liquidator of an insurance company is also a familiar figure. Cf. *Clark* v. *Williard*, 292 U. S. 112.

torship or operating receivership. Every document that was issued, every Government action which was taken, is consistent with this view,[49] and there is neither need nor warrant for invoking eminent domain or the idea of a "taking". The establishment and maintenance of a conservatorship or receivership is plainly an exercise of non-eminent domain regulatory powers—powers which have not been challenged in this suit, and could not well be.

3. This conception of the take-over of struck mines or plants as a federal receivership or conservatorship was publicly advanced in November 1941, long before the coal mines were "seized" in May 1943. At the hearings held by a subcommittee of the Senate Judiciary Committee on S. 2054, 77th Cong., 1st Sess., a predecessor of the bill which ultimately became the War Labor Disputes Act, Under Secretary of War Patterson said, in discussing the plant seizure provision of S. 2054, (Hearings before Subcommittee of the Senate Judiciary Committee on S. 2054, 77th Cong., 1st Sess., pp. 13-14 (November 1941)):

> Secretary Patterson. I suppose, if the Government took over, under the provisions of

[49] This is true of everything mentioned by the Court of Claims as being done or ordered by the Government, including the display of placards bearing the legend "United States Property", the distribution of posters and booklets containing the Executive Order and the President's radio address of May 2, 1943, the regulation that the Government's "possessory

this act, it would be acting a good deal in the capacity of a receiver.

Senator Connally. Or a proprietor.

Secretary Patterson. A receiver that would be charged with the continuity of operation of the plant, and, of course, a return to the normal private management as soon as possible.

* * * * *

Secretary Patterson. * * * I view this really as the equivalent of a temporary receivership. Not in the sense at all that any plant is financially embarrassed. Where you have had, for many years, a rule that a receiver could move in at the instance of creditors or of dissenting stockholders when they think there is trouble in management or operation of a plant and when they feel their interests are imperiled, it strikes me that those things are really, important as they are, of trifling moment compared with the necessity for continuous production for national-defense purposes. * * *

Senator Hatch. As a matter of fact, this is not a drastic bill at all, is it, Mr. Secretary?

Secretary Patterson. It does not seem so to me, when you think how the conduct of a business is taken over by a court every day of the year in ever (*sic*) State in the Union, I suppose because they think the interests of persons who have loaned money to the plant may be jeopardized.

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interest" is "deemed" to be protected by the criminal laws protecting federal property, and the various other specific directives discussed above (*supra*, pp. 11-16, 37, 55 *et seq.*).

This characterization of a take-over as a temporary operating receivership was expressly accepted and used by at least one of the members of the subcommittee (Senator Burton). Hearings, *supra*, pp. 16, 18, 71, 129-130. And, in the course of the hearings, Senator Connally described the status of the private employer as one who "will continue to operate it under the supervision of the Government, under the same conditions that he operated it heretofore". (Hearings, p. 55). He further queried (Hearings, p. 57):

> Is there anything unfair to the employer to say, "Mr. Employer, you have a plant here which is producing, or ought to be producing, national-defense articles. We are going to require you, for the duration of this emergency, to go on operating under the same relationships with your men that you had, that were assumed voluntarily, prior to the emergency.
>
> We are not going to draft your plant and take it away from you; we are going to pay you what is fair and what is just under the law."[50]

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[50] Senator Connally's reference to fair and just payment does not imply that he was necessarily thinking in terms of a Fifth Amendment taking, and should be read in light of the following colloquy with Senator Ellender, in the course of the debate on the War Labor Disputes Act (89 Cong. Rec. 3811):

> Mr. Ellender. Is it not true that whenever the Government has taken over a plant, as has been done in the past, the management has remained the same and there have been no damages of any kind to the owners of the plant?
>
> Mr. Connally. I will say to the Senator that I think that is true in every case except, probably, one where the

Mr. Lee Pressman, representing the C.I.O. in opposition to the measure, pointed out that the take-over proposal in S. 2054 differed radically from the requisition, drafting, or condemnation of property under the eminent domain statutes or Section 9 of the Selective Training and Service Act. Hearings, *supra*, p. 143.

On the other hand, we know of nothing in the hearings on S. 2054, or in the legislative history of the War Labor Disputes Act, which requires the conclusion that Congress viewed a take-over as necessarily involving a constitutional taking rather than an operating receivership or conservatorship. Some statements were made in Congress that the owners or operators would receive fair and just payment or just compensation (89 Cong. Rec. 3895-6, 5724, 5792), but the context reveals, we believe, that, at most, the references were all to plants or mines which were fully taken by the Government and run for its account, or, perhaps, to instances in which there would be drastic interferences with the user's possession and control—not to the type

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management was in turmoil and the Government went in and effected a reorganization.

Mr. Ellender. I meant in most cases. I had in mind the case to which the Senator refers.

Mr. Connally. Except for that one case, I think the management was the same, the property was returned to the owners, and nobody was damaged, and, so far as I know, no compensation was paid to the owners for any damages.

Mr. Ellender. As I understand, under the recent seizure of the coal mines the management will not be changed to any extent.

of take-over involved here or in *Wheelock*, Nos. 169 and 177. There are no indications that a take-over could not stop short of a constitutional taking, or that just compensation had to be paid where the possession remained that of a receiver, conservator, or custodian.[51] Congress desired to make payment only where it would be required to do so by the Fifth Amendment, and in no other circumstances. See also the Government's Brief in *Wheelock*, Nos. 169 and 177, at pp. 37-8.

4. Recent state statutes providing for state "seizures" of certain struck businesses also indicate the appropriateness of characterizing the instant take-over as an operating receivership. For the statutes of Virginia, Massachusetts, and Hawaii undertake to define the relationship between the state and the owner in terms suitable only to such a receivership.

Chapter 9 of Virginia Acts of Assembly, (Extra Sess. 1947) authorizes the governor to take possession and operate certain public utilities for the purpose of preventing interruption or suspension of operation because of labor disputes. Section 12 of that Act provides that the state shall retain "as compensation for its services in operating the utility," 15% of the net income earned during the period of state control, with net income computed

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[51] Senator Tydings' statements, quoted above in fn. 28, pp. 43-4, as well as Senator Connally's, quoted above in fn. 50, p. 79, would seem to show an explicit awareness that something much less than a "taking" could properly be ordered under the Act.

after deducting from gross income, as one of the items of expense, reinbursement to the state of all expenses incurred by it in preparing to operate the utility.[52]

The Massachusetts statute (Acts and Resolves of Massachusetts, 1947, c. 596) authorizing the Governor to make such seizures provides in Section 4(a) (B) (1) that the Governor may:

> Take possession of any plant or facility of a party to the dispute the operation of which by the commonwealth he deems to be necessary as a result of such dispute, in order to safeguard the public health or safety. * * * Such plant or facility shall be operated for the account of the person operating it immediately prior to the seizure; provided, that such person shall have the right to elect, by written notice filed with the governor within ten days after such seizure, to waive all claims to the proceeds of such operation, and to receive in lieu thereof fair and reasonable compensation for the appropriation and use of his property * * *.

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[52] This Virginia statute is to be contrasted with the earlier Virginia Act of February 22, 1946 (Acts 1946, ch. 39, p. 59, Code, 1946 Supplement (Michie), Sec. 2072 (33)), providing for the temporary taking over and operation by the State of ferries. That statute specifically "vested" the State Highway Commissioner "with the power of eminent domain, so far as same may be necessary, to acquire for temporary use in connection with the State Highway System any such ferry, the normal operation of which has been so impaired or suspended. * * *." (Sec. 2). The ferry was to be operated "for the account of the State Highway Department" (Sec. 4), and the owner was "to receive reasonable, proper, and lawful compensation for the use of the ferry * * *." (Sec. 6). See *Anderson* v. *Chesapeake Ferry Co.*, 186 Va. 481.

The Hawaii Stevedoring Industry Act (Act 2, Spec. Sess. Law, 1949), which was to expire 180 days after its effective date, authorized the Territorial Governor to seize any struck stevedoring company. Section 3 provided that each company shall be operated by the Governor for the "account of the company," but each company was given the right to elect "to waive all claims * * * to the revenues of operations, and to receive in lieu thereof fair and reasonable compensation for the appropriation and use of its property, without allowance for prospective profits * * *."

These statutes are not only consistent with, but are solely explicable as, authorizing the establishment of an operating receivership. Otherwise, Virginia would not be justified in retaining 15% of the net income as a management fee, nor would Massachusetts or Hawaii have undertaken to operate the plant on the account of the person operating it immediately prior to the seizure.[53]

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[53] The Missouri statute ((Laws of Missouri, 1947) H.B. 180) merely authorizes the Governor "to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest" (Section 19), and does not undertake in any way to define the relationship of the State to the prior operators of the enterprise during the period of state control.

The New Jersey statute (N.J. Rev. Stat. Cum. Supp. 1945-1947, Section 34:13B-1 *et seq.*) similarly omits any reference to the state-operator relation during state control. Section 34:13B-13 provides that the Governor may "take immediate possession of the plant, equipment or facility for the use and operation by the state of New Jersey in the public interest," and that he shall return the seized property "to the owners thereof as soon as practicable after the settlement of said labor dispute." The statement of policy in Section 34:13B-1, that

5. In its opinion, the Court of Claims says that unless the present take-over constituted a constitutional taking the documents issued by the Government would be "all pretense and sham", and the necessary implication would be that the Government had practiced a "fraud" upon the miners (R. 44). We do not believe that these accusations could justly be leveled even if the idea of a receivership or conservatorship had not been readily available to be borrowed and applied. In the *Marion & Rye Valley Ry.* case (*supra*, pp. 47-9), after World War I, the Court of Claims did not feel compelled to find a constitutional taking, even though it was presented with government orders and proclamations wholly comparable in their terms to those issued here. That case had long been on the books when Executive Order 9340, and the subsidiary orders, were proclaimed. Moreover, the formal taking of "possession" on behalf of the United States would not, we submit, be a pretense or a fraud upon the miners if it meant only that the United States, as *parens patriae* or as prime custodian and trustee of the Nation's welfare in wartime, would now be the ultimate arbiter of the terms and conditions of employment.

"after the taking of possession of any public utility * * *, such public utility shall become for purposes of production and operation a state facility and the use and operation thereof by the state in the public interest shall be considered a governmental function of the state of New Jersey" and the definition of the relation between New Jersey and the persons employed at the seized plant as that of employer-employee (Section 34:13B-19) are inconclusive on the question presented here.

And except on a casual or colloquial reading of the orders and regulations, there was no reason to believe that the Government had undertaken to do more, unless later circumstances required.

In any event, the court's conclusion wholly disregards the cardinal fact that the "seizure" was, or at least could have been, a form of receivership or conservatorship. As we have said (*supra*, 44-5, 71-2, 76-7), every action taken by the Government, including the posting of signs describing the mines as "United States Property" (R. 22), was consistent with the establishment of such a receivership. The Government would surely not be "dishonest" or lacking in "integrity" (R. 44) if it induced the miners to return to work by instituting the type of control a receiver has over a railroad or a conservator over a bank.

Moreover, not only was it immaterial to the miners whether the Government's "seizure" constituted a "taking" or an operating receivership, but it is clear that they fully appreciated the limited scope and purpose of the "seizure". In the Hearings before the House Committee on Ways and Means, on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st Sess., Mr. Percy Tetlow, representing UMWA, described Secretary Ickes "as custodian of the mines under an Executive order of the President" (p. 407), stated that Secretary Ickes "was only concerned in getting the mines operating, as custodian of the mines" (p. 408) and that he "was operating [the mines] for

the operators" (p. 410). To the question whether UMWA was "planning to ask that the mines be nationalized and the Government pay the increases," Mr. Tetlow answered: "No; we certainly do not favor the nationalization of the mines. We are not in favor of that. We think they should be operated by the owners." (p. 410).[54]

E. United States v. United Mine Workers, 330 U.S. 258, *does not require a different conclusion.*

The problem raised by the instant case, while recognized in the opinion of the Court in *United States* v. *United Mine Workers,* 330 U.S. 258, was expressly not passed upon by the Court. That case, which arose during the fourth government coal mine seizure in 1946-1947, presented no question as to the relationship of the Government *vis à vis* the operators during the period of federal control. The Court was concerned only with the relationship between the Government and the miners, and then only for the limited purpose of determining the applicability of the anti-injunction provisions of the Norris-LaGuardia Act. The question, as stated by the Court (330 U.S., at 285-286), was

> not whether the workers in mines under Government seizure are "employees" of the Fed-

[54] To the extent that it made any difference to the miners or other workers in a government-"seized" business, they would prefer, it seems to us, the definition of legal relationships which would minimize the owner's recovery on account of the "seizure." The less the owner stood to gain from the "seizure," the more would be the pressure on him to seek its termination.

> eral Government for every purpose which might be conceived [citing Sec. 23 of the Revised Regulations for the Operations of the Coal Mines Under Government Control, which provides "* * * nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment"] but whether, for the purposes of this case, the incidents of the relationship existing between the Government and the workers are those of governmental employer and employee.

In holding that the miners were employees of the Government for this purpose, the Court relied heavily upon the objectives of government control and the Krug-Lewis agreement to which, the Court noted, the operators were not a party (330 U.S. at 287). The Court refused, however, to "express any opinion as to the validity" of the various provisions of the Regulations defining the Government-operator relationship [55] since they had "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers" (330 U.S., at 288). It is plain, therefore, that the Court viewed the Government-operator relationship as having little bearing on

[55] The Court's opinion refers specifically to provisions of the regulations which provided that "none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit" (330 U. S., at 288).

the issue of Government-miner relationship then before it, and that it left completely open the questions raised here. Nothing in the Court's opinion even suggests that merely because the Government, as the court below puts it, "asserted the complete right to direct control and control [but], in fact, never exercised this right" (R. 44), there was a "taking" of the operators' "property," or that limited control over the operators' activities would constitute the transfer of a proprietary interest to the United States.

Furthermore, nowhere in the concurring opinion of Justice Frankfurter or the dissenting opinions of Justices Murphy and Rutledge, is there any indication that these Justices considered the Court's opinion as defining the relationship between the Government and the operators, or that they believed that the Government had taken, in the Fifth Amendment sense, the mining properties from the operators (330 U.S., at 307, 335 *et seq.*). The implications of these opinions are, rather, to the contrary (see 330 U.S., at 320, 322, 337-339).

Justices Black and Douglas alone expressed the thought that "the Government operates these mines for its own account as a matter of law," and they referred to "full and complete government operation for its own account." But, at the same time, they recognized that this was "apparently contrary to the implications of the regulations" (330 U.S., at 329). As our entire argument in this case and in *Wheelock* shows, we do not believe that the

War Labor Disputes Act (under which the motor carriers were "seized"), or the President's executive authority (under which the present "seizure" took place), required the Government's possession to be as complete as in a constitutional taking, or would invalidate the regulations issued here and in *Wheelock*. But even if we are wrong, that issue is not present in either suit. In both cases, the administrative regulations have not been challenged by either party, and their validity is not in dispute. Both the United States and the respondents (Pewee and Wheelock) have heretofore assumed the lawfulness of the administrative orders and regulations, and have acted on that basis. In these circumstances, it is both procedurally proper and substantively just to make the same assumption in this Court, and, insofar as respondents are concerned, to treat the take-overs as not involving operation by the Government for its own account.[56]

II

Even If There Were a Technical Taking, Respondent Is Not Entitled to Any Compensation

Having held that there had been a taking, the Court of Claims turned to the question of compensation. The court rejected respondent's claim that

[56] By way of analogy, if Congress had authorized and directed the executive to condemn the fee title of certain property and, nevertheless, the Government officials, with the owner's full acquiescence, had taken only a leasehold for a number of years and had then turned the property back, the owner could certainly not thereafter claim compensation for a full fee taking.

its compensation should be measured by the losses it sustained in operating its mine during the period of government control "because there is no showing that the Government's seizure of the mines caused the loss in operations" (R. 46).[57] Instead, relying upon the similar ruling in its contemporaneous opinion in *Wheelock*, the court awarded, as the measure of just compensation, the amount of increased benefits which Secretary Ickes directed to be paid to the miners in accordance with WLB's findings of May 25, 1943, *supra*, pp. 6, 12-13, 16, 17.

In our brief in *Wheelock*, we show the unsoundness of the Court's measure of damages, as there applied (See Brief for the United States in Nos. 169, 177, pp. 56-60). We think that its holding in this case is, *a fortiori*, groundless, for here, unlike *Wheelock*, the Government's intervention and WLB's subsequent award were fully acceptable to the operators. There is no reason to believe, and there is no proof, that respondent would have refused to pay these increased benefits had the miners been willing to continue working on that basis without government control (*supra*, pp. 61-2). Consequently, there is no showing of any loss or injury attributable to the alleged taking.

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[57] While there is no question presented in this case as to the propriety of this action of the Court of Claims, the question is raised by the cross-petition in *Wheelock*. As we show there, the court's rejection of operating loss during the control period (regardless of its connection with the "seizure"), as the measure of compensation, was sound. See Brief for United States in Nos. 169, 177, pp. 60-77.

In addition, it is plain, as in *Wheelock*, that federal intervention resulted in a net benefit to respondent. At the time that the Government "seized" the mines, the miners were refusing to go into the mines and produce coal unless their demands for substantial increases in wage benefits were satisfied. These increased benefits were estimated as involving an additional cost of about $5 per day for each miner, which, in the case of respondent, employing 150 miners, amounted to about $750.00 per day. The operator's refusal to accept these demands would have left them subject to the heavy overhead costs of idle mines for the period of time until, as a result of economic attrition, they arrived at a wage agreement with the miners. Lacking federal intervention, therefore, respondent and the rest of the industry were faced with the dilemma of maintaining idle properties or of meeting UMWA's substantial contract demands. Apparently to avoid the horns of this dilemma, the operators were anxious that the Government intercede and repeatedly requested it to do so (R. 5, 7).

Thus, the operators benefited substantially from the President's "seizure" of the mines in two ways. First, they did not have to bear the overhead costs of idle mines. It would be hard to find a bigger liability than an inactive coal mine. The expense of maintaining its operating efficiency must be incurred or else it may soon become unusable.

Then, too, whether the mine is producing 1000 tons or zero tons per day, there are various fixed charges that remain the same as, for example, depreciation on plant and equipment.[58] Indeed it was the constant pressure of such charges which seems to have led to Pewee's improvident tonnage practices, *supra*, pp. 16-17. Secondly, Pewee was benefited by being both freed from having to satisfy anything but a small fraction of UMWA's total demands, and protected during the period of federal control against the renewal of the miners' wage demands. The miners made it clear that they would work for any amount less than their full demands only under the auspices of the Government, and after the issuance of Execu-

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[58] "Coal operators are very sensitive to changes in the volume of production since there is an unusually large element of overhead. Capital charges go on unabated, and as days of operation diminish, the cost per ton increases rapidly. Property taxes are in no way moderated. Insurance has to be kept up. Pumping and ventilation costs do not diminish proportional with decreased tonnage. Depreciation goes on faster when the mine is idle than when it is working. Gas and acid waters require use of men, materials, and power. If the mine is mechanized, fixed charges are greater than otherwise in relation to direct costs * * *

"Furthermore, the pressure to maintain production is brought about by the fact that if the mine is not maintained at operating efficiency it shortly becomes completely unusable. Falls of roof, squeezes, etc., set in and make recovery difficulty if not impossible. The investment, in other words, has a very definite time element running against it. Maintenance workers' pay continues regardless of the time the mine operates. Superintendents must be paid; office employees are hired by the month." *The Coal Industry* by G. L. Parker, at p. 6. See also Hearings before House Committee on Ways and Means on Extension of Bituminous Coal Act of 1937, 78th Cong., 1st sess., at pp. 241-244.

tive Order 9340 they ultimately agreed to return to the mines, until October 31, 1943, on the condition that the arrangement would "automatically terminate if the government control is vacated" before then (R. 17).

That Pewee was aware of the great benefits it would and did receive from the Government's seizure of the mine is manifest both from the eagerness with which it welcomed governmental action (R. 19), and from its recommendation of August 6, in response to the request of Secretary Ickes for information upon which he could make a determination as to release of the mines, that (R. 26-27):

> * * * in my opinion the Government should continue active control of the mines if not all mines, certainly mines such as ours whose finances are in none too good condition if and until a new wage contract is negotiated since anything like a $1.25 per day wage increase retroactive to April 1st would completely bankrupt such mining companies.[59]

And only a week before its mine was released on October 12, respondent seems to have discouraged the ending of control at that time. *Supra*, p. 15.

Clearly, therefore, even if there were a taking of Pewee's mine, it was not such a taking as entitled

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[59] In the latter part of July, 1943, UMWA signed a contract with a segment of the industry, to apply retroactively to April 1, 1943, which provided for this $1.25 payment and certain other benefits for the miners. 10 War Labor Rep. 684, 770.

Pewee to any compensation under the Fifth Amendment, for there was no showing that respondent incurred any loss as a result of the Government's actions, and, in any event, the benefits resulting to Pewee were far greater than any losses it may have suffered.[60] Accordingly, "nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, 282. As the Court of Claims put it in the *Marion & Rye Valley Ry. Co.* case, since the company had suffered no net loss as a result of government control, "it would be gross injustice to require the United States to pay something for nothing." 60 C. Cls. at 252. (See also Brief for the United States in *Wheelock*, Nos. 169, 177, pp. 56-60).

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[60] Respondent bears the burden of proving that it suffered a net loss on account of the taking. *Marion & Rye Valley Ry.* v. *United States*, 270 U. S. 280, 285; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 273; *United States* v. *Felin & Co.*, 334 U. S. 624, 641; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396, 406; *United States* v. *Commodities Corp.*, 339 U. S. 121, 128.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed with directions to enter judgment in favor of the United States.

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DECEMBER 1950

APPENDIX

1. The Certificate of Appointment of Operating Managers, which is reproduced in the findings below (R. 19-21), provided:

> Whereas The Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:
>
> (1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.
>
> (2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owning or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owing or belonging to the company previously operating the mine that the rights to the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules and regulations issued by the Solid Fuels Administrator for War.

(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

(10) The Operating Manager shall, in such operation, distribution and sale, comply with all applicable Federal and State laws and regulations.

(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of Company)", but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

(14) This appointment shall be effective immediately.

2. (a) The Coal Mines Regulations (8 Fed. Reg. 6655) as promulgated on May 19, 1943, provided:

PART 603—OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

GENERAL

§ 603.1 *Authority for regulations.* These regulations are issued under the authority of Executive Order No. 9340, dated May 1, 1943 (8 F.R. 5695), authorizing and directing the Secretary of the Interior

> * * * to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.

§ 603.2 *Scope of regulations.* These regulations shall govern the operation of all coal mines placed under Government control pursuant to Executive Order No. 9340 by orders of the Secretary of the Interior of May 1, 1943 (8 F.R. 5767) taking possession of all coal mines operated by the companies specified in the appendices attached thereto, including any

and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products, for operation by the United States in furtherance of the prosecution of the war.

§ 603.3 *Effect of regulations.* These regulations shall supersede all prior orders or instructions governing the operation of such coal mines to the extent that such orders or instructions are inconsistent with these regulations.

§ 603.4 *Purpose of operation.* The primary object of Government intervention in the operation of the said properties is the maintenance of full production of coal for the effective prosecution of the war. All duties and authorities set forth in these regulations are to be construed in the light of this purpose, and if any regulation interferes with the accomplishment of this purpose, prompt application must be made to the Solid Fuels Administrator for War to secure the waiver or modification of such regulation.

§603.5 *Plan and policy of operation.* (a) Control of the operations of the coal mines will be exercised by the Government to the extent necessary to maintain maximum production. Wherever the cooperation of the company and its personnel can be secured, the existing organization of the mining company will be utilized, and the company will continue operation in the regular course of busi-

ness as a going enterprise, conforming with such directions as the Government may issue. Where the prompt and effective cooperation of a company cannot be secured, appropriate action will be taken under §§ 603.30 and 603.31 of these regulations.

(b) All properties in the possession of the Government shall be operated in a manner consistent with the fact that title to the properties remains in the owners thereof and that the Government, having temporarily taken possession or custody, will assert only such rights as are necessary to accomplish the national purpose of continued and maximum production.

(c) Possession and operation by the Government are to be terminated as soon as this can be done without injury to the furtherance of the war program.

§ 603.6 *Definitions.* (a) As used herein, (1) The term "coal mines" means the coal mines of which possession was taken by the orders of the Secretary of the Interior of May 1, 1943, and any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products.

(2) The term "company" or "mining company" means the corporation, partnership, association, or individual in possession and control of coal mines immediately prior to the taking of possession of such coal mines by the Secretary of the Interior.

(3) The term "Solid Fuels Administrator for War" means the Administrator of the Solid Fuels Administration for War, created by the Executive order of April 19, 1943 (8 F.R. 5355).

ORGANIZATION FOR OPERATION

§ 603.10 *Supervision and direction.* The power, authority, and discretion of the Secretary of the Interior with respect to the operation of the coal mines may, under the authority of Order No. 1807 of the Secretary of the Interior dated May 1, 1943 (8 F.R. 5767), as amended by Order No. 1812, dated May 6, 1943 (8 F.R. 6006), be exercised by the Solid Fuels Administrator for War (hereinafter referred to as the Administrator) and, subject to his supervision, by the Deputy Solid Fuels Administrator for War (hereinafter referred to as the Deputy Administrator) to the same extent and with the same effect as such power, authority, and discretion may be exercised by the Secretary of the Interior. The power, authority, and discretion of the Administrator and Deputy Administrator may be exercised by them through such personnel of the Solid Fuels Administration for War and the Department of the Interior and in such manner as the Administrator or Deputy Administrator may determine. The authority to direct and supervise the operation of the coal mines within their respective territories has been delegated, subject to the supervision of the Administrator and Deputy Admin-

istrator, to the Regional Bituminous Coal Managers and the Regional Anthracite Coal Manager (hereinafter referred to as the Regional Managers).

§ 603.11 *Designation of Regional Managers.* Within each region served by a field office of the Bituminous Coal Division of the Department of the Interior, the manager of the said office, or such other person as the Administrator may appoint, shall serve as Regional Bituminous Coal Manager. Within the anthracite coal mining region in Pennsylvania, the Chief of the Mineral Production Security Division in the Bureau of Mines of the Department of the Interior, or such other person as the Administrator may appoint, shall serve as Regional Anthracite Coal Manager.

§ 603.12. *Duties of Regional Managers.* Each Regional Manager is authorized, subject to the orders of the Administrator, to exercise full powers of supervision and direction over the operation of all coal mines in the possession of the Government within his territorial jurisdiction during the period of Government control of the said mines. He shall have authority to issue (except as provided in §603.32) specific directions as to the production, sale and distribution of coal by the mines subject to his supervision, and as to all operating and financial arrangements for such mines. He shall also have authority to advise, and to issue directions, with respect to the construction of applicable orders and regulations.

All directions and orders shall be in writing and a copy shall forthwith be mailed to the Administrator.

§ 603.13. *Designation of Advisory Councils.* The Chairman and the Labor Representatives of each Bituminous Coal District Board in the territory covered by each of the several field offices of the Bituminous Coal Division shall constitute a Regional Advisory Council. The members of the Regional Advisory Council shall serve without compensation and will be expected to be on duty in the offices of the Regional Managers at such times and for such periods as may prove necessary. Where there are two or more chairmen of District Boards or two or more labor representatives on any Regional Advisory Council either or both groups may designate one man to serve in the absence of the others of such group. The two anthracite operator representatives on the Solid Fuels Advisory War Council and the anthracite labor representative on that Council, together with one other representative selected by him, shall serve as an Anthracite Advisory Council.

§ 603.14 *Duties of Advisory Councils.* (a) Each Regional Advisory Council shall serve as advisor to the Regional Manager within the area of its jurisdiction and to the Administrator, transmitting to the said Regional Manager all complaints and suggestions with reference to the operation of mines under Government control within the area of its jurisdiction, together with its recommenda-

tions respecting such complaints and suggestions and the reports of any investigations conducted with regard to the same. The members of each Regional Advisory Council shall be freely consulted by the Regional Managers, and any member may be assigned such executive duties as the Regional Manager may prescribe or delegate. Any member of the Regional Advisory Council shall be free to make specific or general suggestion or complaint to the Administrator who will give it his prompt and careful consideration.

(b) The Anthracite Advisory Council, in liaison with the Regional Anthracite Coal Manager, shall exercise powers and responsibilities similar to those of the bituminous coal Regional Advisory Councils.

§ 603.15 *Designation of Operating Managers.* (a) The operation of the coal mines of a mining company will ordinarily be entrusted to an officer of the company formerly in charge of operations who is authorized to act for the said company and who will, under appointment by the Administrator, during the period of Government control, act as Operating Manager for the United States, while continuing to serve as an officer and employee of the mining company. At the request of the said company, such person may be removed from the position of Operating Manager for the United States, and an officer or employee of the company nominated by the company may be appointed by the Administrator.

(b) Where the prompt and effective cooperation of the mining company in the operation of the coal mines under Government control cannot be secured, a person other than an officer or employee of the company may be designated as the Operating Manager for the United States by the Administrator.

(c) Where a company is in receivership or trusteeship, the receiver or trustee will ordinarily be designated Operating Manager for the United States.

§ 603.16 *Status of Operating Managers.* (a) Any officer or employee of a mining company who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

(b) The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concur-

rence before he takes such action. If consent is denied, the Operating Manager shall so report to the Regional Manager, stating the circumstances of the denial. The Regional Manager shall transmit the report to the Administrator, and the Operating Manager may proceed to take the action in question only upon direction of the Administrator.

(c) Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

(d) The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager.

§ 603.17 *Duties of Operating Managers.* (a) Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

(b) An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has

been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as "Operating Manager for the United States, (name of company)".

OPERATION OF MINES

§ 603.20 *Statement of property taken.* The Operating Manager of each mine shall promptly submit to the Regional Manager of the area in which the mine is located a statement specifically enumerating and defining the properties under his management, in accordance with a form to be furnished by the Administrator. Such statement shall be promptly submitted by the Regional Manager to the Administrator with recommendations as to any corrections that may appear proper and shall be subject to such correction as the Administrator, or any other official specifically designated for the purpose by the Administrator, shall from time to time find to be necessary. A copy of such revised statement shall be returned to each Operating Manager to serve as a guide to him and any successor Operating Manager in the performance of their functions.

§ 603.21 *Accounts and records.* (a) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

The same set of books may be used so long as items of payments, receipts, and all other transactions engaged in on and after May 1, 1943, may be easily separated from items concerning transactions engaged in before that date.

(b) The Operating Manager shall render such accounting as the Administrator may, from time to time, prescribe.

§ 603.22 *Financial and commercial transactions.* (a) Ordinary financial and commercial transactions shall be carried on so far as possible, in accordance with the customary procedures and policies of the mining company. The Operating Managers shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to continue the enterprise, utilizing any funds or properties due or belonging to the mining company, and shall draw upon the funds and accounts of the company, utilizing customary sources of credits or funds, and make all necessary disbursements. No major disbursements of an extraordinary nature shall be made without the approval of the Regional Manager.

(b) The Operating Managers shall, if the need arises, inform all third persons with whom they enter into such transactions that such transactions are being carried on, under the authority of the Government and the company, in accordance with customary procedures and policies, that the company remains subject to the usual methods of enforcement of its obligations, and that the Government

expects that the acts and agreements of the company will be accorded the same consideration and effect as in the absence of Government control.

§ 603.23 *Employment*—(a) *Working conditions.* In accordance with Executive Order No. 9340, the customary working conditions shall be maintained in all mines.

(b) *Collective bargaining.* In accordance with the terms of Executive Order No. 9340, the customary machinery for the adjustment of workers' grievances shall be maintained in all mines and the right of the workers shall be recognized to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operation of the mine.

(c) *Employment benefits.* All benefits enjoyed by employees of the mine under private control, including State and Federal insurance payments and benefits, workmen's compensation coverage, and group insurance, and all arrangements governing the payment of wages, including war bond purchase plans and the check-off of union dues, shall be continued.

(d) *Personnel.* Operating Managers shall use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any

eventual wage adjustments will be made retroactive, but they shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, they shall communicate with the appropriate Regional Manager for transmission of said request to the proper officials.

(l) All personnel of the mines, both officers and employees, shall be considered as called upon by Executive Order No. 9340 to serve the Government of the United States, but nothing in these regulations shall be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment.

§ 603.24 *Application of Federal and State Laws.* (a) The mining companies, their personnel and their property are deemed to remain subject during the period of Government control to all Federal and State laws and to actions, orders, and proceedings of all Federal and State courts and administrative agencies. The companies are expected to meet all Federal, State and local taxes, contributions, and assessments in the customary manner.

(b) The mining companies are deemed to remain subject to suit as heretofore. However, no Operating Manager or Regional Manager is authorized to bring suit, accept service, or enter any legal proceeding, on behalf of the United States without specific direction from the Administrator. Information as to the pendency, necessity, or probability of any

legal proceeding which casts in question any right of the United States should be promptly transmitted by the Operating Manager to the Regional Manager and by the latter officer to the Administrator, with appropriate recommendations concerning the assignment of legal counsel if such assignment is indicated.

(c) The possessory interest of the United States in the properties of the companies is deemed to be protected by the criminal laws protecting United States property.

ENFORCEMENT OF REGULATIONS AND ORDERS

§ 603.30 *Enforcement powers of Regional Managers.* In any case where the prompt and effective cooperation of a mining company cannot be secured, the Regional Manager may issue appropriate instructions for the operation of the coal mines of such company and shall immediately report the circumstances and his instructions to the Administrator. Pending receipt of directions from the Administrator, it shall be the duty of the Regional Manager to deny access to the premises to persons not contributing to the operation of the enterprise, to prevent any interference with the coal mines or the operations under Government control and to see that the production of coal is continued.

§ 603.31 *Removal of Operating Managers.* Upon failure of an Operating Manager to comply with these regulations or the orders of the Administrator or the Regional Managers or upon failure of a mining company

to respect the action taken by its Operating Manager who is an official of the company, the Regional Manager shall report to the Administrator the desirability of the removal of the Operating Manager, with such recommendations for a substitute as he may wish to make.

§ 603.32 *Use of military force.* Any request for the use of the armed forces of the United States to protect life or property in connection with the operation of any mine under the control of the United States shall be submitted by the Operating Manager in charge of the mine to the Regional Manager, who shall promptly transmit it with his recommendation and that of the liaison officer designated by the Secretary of War for the district in question, to the Administrator for decision as to whether a request for such protection shall be submitted to the Secretary of War pursuant to the provisions of Executive Order No. 9340. No Operating Manager and no Regional Manager shall have authority to make a request for military protection directly to any officer of the War Department or of the United States Army.

TERMINATION OF GOVERNMENT CONTROL

§ 603.40 *Methods of termination.* Government control of any property affected by these regulations may be relinquished in one of the following ways:

(a) Such control and possession of all properties under Government control, including

all accrued assets and rights, may be relinquished upon fulfillment of the following conditions:

(1) Satisfactory assurances shall be presented to the Administrator that under restored private control full operation of the coal mines will be continued;

(2) The mining company shall execute a ratification agreement by which it adopts and ratifies all acts performed by the Operating Manager for the United States in the operation of the coal mines of the company during the period of Government control and covenants and agrees that the Government of the United States and its officials are released from all claims by or on behalf of the company by reason of the possession and control of the coal mines, and that the company will hold the Government of the United States and its officials harmless with respect to any claims or liabilities arising out of acts performed during the period of such possession and control; and

(3) The executed ratification agreement shall be accompanied by evidence of the authority of the officer executing the agreement to act for the company in this respect. If the only official duly authorized to execute the agreement is the Operating Manager for the United States, or if no official has authority to execute the agreement without specific authorization from the Board of Directors, the executed agreement shall be accompanied by a

resolution of the Board of Directors authorizing the execution of the agreement. If the coal mines to be released were, prior to May 1, 1943, in the possession and control of an individual rather than of a company, the ratification agreement shall be executed by such individual, whether or not he is the Operating Manager for the United States. If the possession and control prior to May 1, 1943, were in a partnership, the ratification agreement shall be executed by all the partners.

(b) In the event that the mining company declines to adopt the acts of management performed during the period of Government control, the Administrator may, nevertheless, return to the said mining company the said property or portions thereof, retaining such assets and rights as may be necessary to compensate for any reasonable expenses incurred in the course of Government operation of the said property and to meet all outstanding obligations incurred in connection with such operation. Pending an accounting and adjudication of all such claims, and of any other claims of interested parties, including any claims of owners based upon negligence in the management of the property, such portions of the said property may be retained in Government control as shall appear to be adequate to cover all adjustments that may be required by such accounting and adjudication.

(b) Amendment No 1 to the Coal Mine Regulations, issued on July 29, 1943 (8 Fed. Reg. 10712) provided:

PART 801—REGULATIONS FOR THE OPERATION OF COAL MINES UNDER GOVERNMENT CONTROL

The "Regulations for the Operation of Coal Mines under Government control" issued by the Secretary of the Interior on May 19, 1943 (8 F.R. 6655), previously designated §§ 603.1 to 603.40, inclusive of Chapter VI are redesignated §§ 801.1 to 801.40, inclusive of Chapter VIII and are amended, as follows:

1. Subparagraph (3) of § 801.6 is amended to read as follows:

(3) The term "Coal Mines Administrator" means the Administrator of the Coal Mine Administration of the Department of the Interior.

2. Section 801.10 is amended to read as follows:

§ 801.10 *Supervision and direction.* (a) The power, authority, and discretion of the Secretary of the Interior with respect to the operation of coal mines may, under the authority of Order No. 1847 of the Secretary of the Interior, dated July 27, 1943, be exercised by the Coal Mines Administrator (hereinafter referred to as the Administrator) and, subject to his supervision, by the Deputy Coal Mines Administrator (hereinafter referred to as the Deputy Administrator) to the same extent and with the same effect as such power,

authority, and discretion may be exercised by the Secretary of the Interior. The power, authority, and discretion of the Administrator and Deputy Administrator may be exercised by them through such personnel of the Coal Mines Administration and the Department of the Interior and in such manner as the Administrator or Deputy Administrator may determine.

(b) The "Regulations for the Operation of Coal Mines under Government Control" issued by the Secretary of the Interior on May 19, 1943 (8 F.R. 6655) are adopted and continued in effect except as amended, amplified and added to from time to time.

3. Paragraph (b) of § 801.17 is amended by changing the period at the end thereof to a comma and adding thereto the following:

* * * as hereinabove and hereinafter specified. No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific direction or order by the Administrator to that effect. Nor shall any operations of any mine property in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine property in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator.

4. Section 801.40 is amended to read as follows:

TERMINATION OF GOVERNMENT CONTROL

§ 801.40 *Method of termination.* Government possession and control of any property affected by these regulations will be terminated by the Administrator upon a determination by him that the requirements for the termination of such possession and control specified in the War Labor Disputes Act of June 25, 1943, have been fulfilled. After the termination of Government possession and control, and for the purpose of ascertaining the existence and amount of any claims against the United States so that the administration of the provisions of Executive Order No. 9340 may be concluded in an orderly manner, the Administrator may require the submission by any mining company of information relating to operations during the period of Government possession and control as hereinafter provided.

The Operating Manager for the United States of each mining company with respect to which the United States Government has taken possession and control shall advise the Administrator when, in his opinion, such requirements for the termination of such possession and control have been fulfilled, specifying the date of declared restoration of productive efficiency, and furnishing to the Administrator the factual evidence supporting his opinion.

Forthwith upon the termination of such possession and control by the Administrator, the mining company may elect to execute and deliver to the Administrator one of the two instruments described in paragraphs 1 and 2 below:

Either:

1. The mining company, by a duly authorized officer or agent, not later than ten days subsequent to such termination, unless such period is extended by the Administrator for good cause shown, shall execute and deliver to the Administrator an instrument of ratification (in the form to be prescribed by the Administrator) by which the mining company adopts and ratifies all acts performed by, and omissions of, the Operating Manager for the United States in the operation of the coal mines of the company during the period of Government control, and covenants and agrees that the Government of the United States and its officials shall not be subject to any claims by the mining company or others by reason of the possession and control of the coal mines of the mining company.

The execution and delivery to the Administrator of such an instrument (hereinafter called Instrument No. 1) shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations during the period of Government possession and control, and a discharge of the Operating Manager for the United States from any liability to the Gov-

ernment with respect to all actions taken by him as such.

Or:

2. The mining company, by a duly authorized officer or agent, not later than ten days subsequent to such termination, unless such period is extended by the Administrator for good cause shown, shall execute and deliver to the Administrator an instrument which specifically reserves to the mining company the right to assert a claim for damage alleged to have been suffered by it during the period of Government possession and control as the direct result of a specific direction or order of the Administrator, or his duly authorized agent, but which in all other respects is the same as Instrument No. 1.

Such instrument shall:

a. Specify the particular direction or order of the Administrator which the mining company asserts directly resulted in damage to the mining company,

b. Specify the particular action taken pursuant to such direction or order, which action would not have been taken except for such direction or order, and which action, it is claimed resulted in damage to the mining company, and

c. Specify the nature of the damage asserted to have been so caused and the amount thereof.

The execution and delivery to the Administrator of such an instrument (hereinafter

called Instrument No. 2), provided such instrument is in conformity with the above prescribed requirements, shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations during the period of Government possession and control, expressly reserving the right, however, to assert by way of offset to any such claimed liability, benefits resulting to the mining company from Government possession and control and any other defense against such asserted liability.

The mining company shall specify to the Administrator such further detailed information with respect to items a, b and c, above, as shall be requested or directed by the Administrator.

If, however, within ten days after the termination of possession and control by the Government, unless such period is extended by the Administrator for good cause shown, the mining company shall not execute and deliver to the Administrator either Instrument No. 1 or Instrument No. 2, as above provided, then the Administrator may assume that the mining company claims, or reserves the right to claim, that all operations during the period of Government possession and control of the property have been for the account of the Government, and accordingly that the Operating Manager for the United States and the mining company are accountable to the Government for their custodianship and disposition of proceeds from operations accruing

during the period of Government possession and control. Pending the completion of such an accounting, the appointment of the Operating Manager for the United States shall continue in force for the purposes of such an accounting and appropriate determinations with respect thereto.

Accordingly, in such an event the Operating Manager for the United States and the mining company shall forthwith cause to be prepared, and shall promptly furnish to the Administrator, the following:

1. A detailed Comparative Balance Sheet as of the date of the termination of Government possession and control and as of the date of the beginning of such period.

2. A detailed Statement of Income and Profit and Loss for the period of Government possession and control.

3. A physical inventory to be taken at the close of such period, for all items normally subject to inventory.

4. A Cost and Tonnage Statement for the period in the form to be prescribed by the Administrator.

5. A detailed analysis of all changes in Current Assets, Investments, Reserves, Fixed Assets and Deferred Charges accounts occurring during the period.

6. A detailed statement of all charges to Bad Debts or against Reserves therefor.

7. An explanation of the basis of charges for Depreciation, Depletion and Amortization for the period.

8. A detailed analysis of all changes in amounts due to or from affiliated companies.

Statements required under items 1 and 2 are to be certified by an independent Certified Public Accountant unless otherwise directed by the Administrator on the application for good cause shown by the mining company. Statements required under items 3 through 8 are to be certified by an authorized officer of the company.

In addition to the foregoing, the Operating Manager for the United States and the mining company shall furnish to the Administrator such additional data and information as the Administrator shall request or direct pertaining to the period of operation under Government possession and control and a fair evaluation of the results thereof.

For the purposes of checking any inventories, accountings or other information submitted under this section 40, accountants and other agents of the Government shall be given reasonable access to all books, papers and inventories of the mining company pertinent thereto.

The books and records of the mining company covering operations during the period of Government possession and control shall be maintained intact pending the completion by accountants or other agents of the Government of such inspection thereof as may be deemed necessary by the Administrator. The books and records of the mining company pertaining to operations subsequent to the ter-

mination of Government possession and control, and pending such inspection, shall be maintained in such fashion that the effect of such operations upon the condition of the company as of the end of the period of Government possession and control will be readily ascertainable.

None of the provisions of this section 40, and no action that shall be taken pursuant to any of them, shall be deemed to constitute acquiescence by the Administrator in any claim that operations during the period of Government possession and control were for the financial account of the Government, or acquiescence in any other claim that the Government is subject to any liability to the mining company or any other person or persons with respect to any such action, or otherwise.

None of the provisions of this section, nor any action taken pursuant to any of them shall be deemed to constitute a waiver by the mining company of any right which it may have to assert a claim against the United States, except as waived by the execution and delivery of Instrument No. 1 or of Instrument No. 2.

(c) Amendment No. 2 to the Coal Mine Regulations, issued on August 13, 1943 (8 Fed. Reg. 11344) provided:

FINANCIAL RESPONSIBILITY FOR OPERATIONS

The "Regulations for the Operation of Coal Mines under Government Control" issued by the Secretary of the Interior on May 19, 1943,

as amended (8 F.R. 6655, 10712) are further amended as follows:

1. Paragraph (a) of § 801.22 is amended by deleting the last sentence thereof.

2. There is hereby added two new sections, designated §§ 801.25 and 801.26 to read, respectively, as follows:

§ 801.25 *Interim procedure for confirmation of financial responsibility by mining company —(a) Execution and delivery of instrument of agreement and certification.* Any mining company, by a duly authorized officer or agent, may execute and deliver to the Administrator an instrument of agreement and certification (in the form to be prescribed by the Administrator) confirming (as hereinafter provided) the sole financial responsibility of the mining company for its operations. Such mining company may, however, as hereinafter set forth, reserve to itself the right to assert claims for liability against the Government with respect to damage allegedly resulting from any specific direction or order of the Coal Mines Administration. The operating manager for the coal mines of any mining company for which such instrument of agreement and certification is in effect shall not be subject to the requirements as to financial transactions and current accountings set forth in § 801.26. The instruments of agreement and certification may be terminated by the mining company at any time upon ten days' written notice, as hereinafter provided.

By said instrument of agreement and certification (subject to reservation of rights to assert claims for damage allegedly resulting from any specific directions or orders as provided in paragraph (c) of this section) the mining company shall:

(1) Agree and confirm as its understanding that the operations of the coal mines of the mining company, and all acts and omissions of the operating manager, from the date of the beginning of Government possession and control to the effective date of termination of the instrument, have been and will continue to be for the financial account of the mining company and not for the account of the United States; and

(2) Adopt and ratify all acts and omissions of the operating manager in the operation of the coal mines of the mining company during such period, and agree that the Government and its officials shall not be subject to any claims by the mining company or others by reason of the possession and control of the coal mines of the mining company during such period; and

(3) Certify that during such period the mining company will not make any disposition of its funds or incur any indebtedness which will impair the working capital of the company so as thereby to jeopardize maintenance of the maximum possible production of coal at its coal mines.

(b) *Effect of such instrument.* Subject to the reservation or rights as provided in para-

graph (c) of this section, the execution and delivery of such an instrument of agreement and certification to the Administrator shall be deemed to constitute a waiver by the Government of all rights which it may have to an accounting with respect to all operations from the beginning of the period of Government possession and control to the effective date of termination of such instrument, and a discharge of the operating manager from any liability to the Government with respect to all actions taken by him as such during that period.

(c) *Reservation of right to assert against the government claims for damage alleged to result from specific directions or orders.* A mining company which has executed and delivered such an instrument of agreement and certification may, nevertheless, reserve to itself the right to assert a claim for damage alleged to have been suffered, or threatened to be suffered, by it as the direct result of a specific direction or order of the Administrator, as hereinafter provided:

(1) As to any specific direction or order which has been issued prior to the date of issuance of these amended regulations, such reservation of right may be made by the mining company's transmitting to the Administrator, together with its executed instrument of agreement and certification, a writing, signed by a duly authorized officer or agent which shall:

(i) Specify the particular direction or order of the Administrator which the mining company asserts directly resulted in damage to the mining company,

(ii) Specify the particular action taken pursuant to such direction or order, which action would not have been taken except for such direction or order and which action, it is claimed, resulted in damage to the mining company, and

(iii) Specify the nature of the damage asserted to have been so caused and the amount thereof,

Upon such transmission to the Administrator of such written specifications, the mining company shall be deemed to have reserved all rights to assert a claim for damage alleged to have been suffered or threatened during the period of Government possession and control as the direct result of compliance with the specified direction or order, and the Government shall be deemed to have reserved all rights to assert by way of offset against any such claim of liability the benefits resulting to the mining company from Government possession and control, and to assert any other defense against such claim.

Failure by the mining company to transmit to the Administrator such a writing, together with its executed instrument of agreement and certification (unless upon request the Administrator shall extend the time for the transmission of the writing for good cause shown) shall be deemed to constitute acquiescence by

the mining company that the consequences of all specific directions and orders issued by the Administrator prior to the date of the issuance of these amended regulations shall be covered by clauses i and ii of the instrument of agreement and certification.

(2) As to any specific direction or order which may be issued subsequent to the date of issuance of these amended regulations, such reservation of right may be made by the mining company's filing a timely protest with the Administrator, as follows:

If, upon the issuance by the Administrator of a specific direction or order to an operating manager for the coal mines of a mining company, the mining company desires to reserve the right to assert a claim for damage alleged to be threatened to be suffered by it as the direct result of compliance with such specific direction or order, then the mining company shall protest such direction or order to the Administrator (as hereinafter provided), and in such written protest shall:

(i) Specify the particular direction or order of the Administrator which the mining company asserts will directly result in damage to the mining company if complied with,

(ii) Specify the action which, it is asserted, is required by such direction or order to be taken, which action would not be taken except for such direction or order, and which action, it is claimed, will result in damage to the mining company.

(iii) Specify the nature of the damage which the mining company asserts will be suffered by it as the result of compliance with such direction or order, and an estimate of the amount of such asserted threatened damage, and

(iv) Protest the specified direction or order.

Such protest shall be dispatched as aforesaid to the Administrator, Department of the Interior, Washington, D. C., by registered mail or telegram within five days of the receipt by the operating manager of the direction or order protested.

Upon the dispatch of such a protest as above provided, the effectiveness of the direction or order, as it applies to the operating manager for the coal mines of the protesting mining company, shall be suspended pending further directions of the Administrator. If thereafter the Administrator, in writing, confirms the effectiveness of the protested direction or order as it applies to such operating manager, such operating manager shall forthwith carry into effect the protested direction or order, with any modifications made by the Administrator in his confirmation thereof.

Thereupon the mining company shall be deemed to have reserved all rights to assert a claim for damage alleged to have been suffered by it during the remainder of the period of Government possession and control as the direct result of compliance with such protested direction or order, and the Government shall be deemed to have reserved all rights to assert by way of offset against any such claim of

liability the benefits resulting to the mining company from Government possession and control, and to assert any other defense against such claim.

In all other respects the provisions of the instrument of agreement and certification shall continue in full force and effect and the operating manager for the coal mines of the protesting mining company shall continue not to be subject to the requirements as to financial transactions and current accountings set forth in § 801.26. The operating manager, however, shall furnish to the Administrator, on his request, such pertinent information and data relating to the effect of compliance with the protested specific direction or order as the Administrator may request.

Failure by the mining company to file such a protest within the five days mentioned (unless upon request the Administrator shall extend the time for the filing of the protest for good cause shown) shall be deemed to constitute acquiescence by the mining company that the consequences of the said specific direction or order shall be covered by clauses i. and ii. of the instrument of agreement and certification.

In the event that the Administrator shall expressly require that a specific direction or order issued by him shall be complied with prior to the lapse of the five-day interval for transmitting a protest as above provided, then the operating manager shall comply forthwith with said specific direction or order and the

mining company may effect a reservation of right by transmitting, within ten days following the issuance of such express requirement, a writing in accordance with the specifications contained in subparagraph (1) above.

(d) *Termination of effectiveness of instrument of agreement and certification.* Any mining company having executed an instrument of agreement and certification, as above provided, may terminate the effectiveness thereof as to all future acts performed by, or omissions of, the operating manager in the operation of the properties of the mining company, by transmitting written notice of such termination, by telegraph or registered mail, to the Administrator, Department of the Interior, Washington, D. C., such termination to become effective ten days after the receipt of such notice by the Administrator.

In the event of such termination, the Administrator may assume that the mining company claims or reserves the right to claim that all operations from that date forward during the remainder of the period of Government possession and control of the mining property are for the account of the Government and accordingly that the operating manager for the United States and the mining company are accountable to the Government for their custodianship and disposition of proceeds from operations accrued during the balance of such period of Government possession and control.

Upon and after the effective date of termination of the instrument of agreement and cer-

tification, as herein provided, the operating manager for the coal mines of the mining company terminating such instrument shall be subject to the requirements as to financial transactions and current accountings set forth in § 801.26.

(e) *Non-acquiescence in claim of liability, and non-waiver of right to claim liability except as specifically waived.* None of the provisions of this section or of § 801.26 and no action that shall be taken pursuant to any of them, shall be deemed to constitute acquiescence by the Administrator in any claim that operations during the period of Government possession and control are for the financial account of the Government, or acquiescence in any other claim that the Government or any of its officials are subject to any liability to the mining company or any other person or persons with respect to any such action, or otherwise. None of the provisions of this section or of § 801.26, nor any action taken pursuant to any of them, shall be deemed to constitute a waiver by the mining company of any right which it may have to assert a claim against the United States except as specifically waived by the execution and delivery of an instrument of agreement and certification (subject to reservation of right to assert claims for damage alleged to result from specific directions or orders, as hereinabove provided).

(f) *Inapplicability of certain provisions of § 801.40 to mining companies executing an instrument of agreement and certification re-*

maining effective at termination of government possession and control. Where an instrument of agreement and certification has been executed and delivered by a mining company and remains in effect on the date Government possession and control of its properties is terminated by the Administrator pursuant to § 801.40 of these regulations, the company will be deemed to have satisfactorily complied with the requirements of that section for the execution and delivery of Instrument No. 1 or Instrument No. 2 therein described, as the case may be.

(g) *Furnishing of information and compliance.* Nothing in this section or in § 801.26 shall be deemed or construed to impair in any way the right of the Administrator from time to time to direct and require the furnishing of information pertinent to the operations of any mining company during the period of Government possession and control, having regard to the purposes of such possession and control as set forth in § 801.4 of these regulations, or the right of the Administrator to enforce compliance with orders or directions issued by him. Nor is anything in this section or in § 801.26 to be deemed to limit in any way the right of the Administrator at any time to exercise his lawful authority to any degree or to any extent as circumstances arise which, in his opinion, necessitate the exercise of such authority in order to effectuate the purposes of Government possession and control as set forth in § 801.4 of these regulations.

§ 801.26. *Requirements as to financial transactions and current accountings.* The operating manager for the coal mines of any mining company for which an instrument of agreement and certification as provided in § 801.25 is not in effect shall not make major disbursements of an extraordinary nature or dividend payments and shall not incur indebtedness other than in the course of normal business unless:

(a) At least ten days prior to the making of such disbursement or payment or the incurring of such indebtedness, the operating manager shall have filed with the Administrator a notice of intention to make such disbursement or payment or to incur such indebtedness, specifying in detail the amount and nature of and the necessity for the proposed disbursement, payment, or indebtedness, and the effect thereof upon the preservation by the mining company of a working capital sufficient to enable it to maintain maximum possible production; and

(b) The Administrator shall have advised the operating manager that he has no objection thereto.

The Administrator may at any time request or direct such operating manager to take whatever steps may be appropriate with respect to full and periodic accountings of the operation of the coal mines; inventories of all real and personal property, franchises, rights, facilities, funds and other assets used in connection with the operation of the coal mines

of the mining company and the distribution and sale of its products; the withdrawal of private management from further participation in the operation of the coal mines; and other pertinent matters. Upon the Administrator's request or direction, such operating manager shall furnish to him such data and information as he may request or direct pertaining to the period of operation under Government possession and control and a fair evaluation of the results thereof; the data requested may include such information for current periods as is specified in § 801.40 for the entire period of Government possession and control. The Administrator may require that financial statements be certified by an independent certified public accountant. Accountants and other agents of the Government shall be given reasonable access to all books, papers and inventories of the mining company.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 168

THE UNITED STATES, PETITIONER

v.

PEWEE COAL COMPANY, INC.

On Writ of Certiorari to the Court of Claims

BRIEF FOR THE RESPONDENT

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Attorney for Respondent

December, 1950

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OPINION BELOW

The opinion of the Court of Claims (R. 41-47) is reported at 115 C. Cls. 626.

JURISDICTION

The judgment of the Court of Claims was entered February 6, 1950 (R. 48). The petitioner's motion for a new trial was denied April 3, 1950 (R. 48). The petition for a writ of certiorari was filed June 30, 1950, and was granted October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTIONS PRESENTED

In the spring of 1943, a labor dispute arose between the operators of most of the nation's bituminous coal mines, including the respondent Pewee Coal Company, Inc., and the United Mine Workers of America (UMWA), the union representing the miners. On May 1, 1943, the Secretary of the Interior, acting under authority of an Executive Order, issued an "Order for taking possession" finding that a strike had occurred at the respondent's mine among others and taking possession of each such mine for operation by the United States in furtherance of the prosecution of the war. On October 12, 1943, the Secretary ordered that possession and control by the United States of respondent's mine and all others then possessed by the Government be terminated.

The questions presented are:

1. Was there a taking of respondent's property so as to require just compensation under the Fifth Amendment?

2. Whether, if there was such a taking, respondent is entitled to recover as part of just compensation the amount of increased wages which were paid by the respondent about June 30, 1943, upon the direction of the petitioner.

ORDERS AND REGULATIONS INVOLVED

Executive Order No. 9340 (8 F. R. 5695) under the authority of which the Secretary of the Interior took possession of respondent's mine is set forth in the Appendix, *infra*, pp. 48-49. The Secretary of the Interior's "Order for taking possession" (8 F. R. 5767) is set out in full in the Statement of the Case, *infra*, pp. 5-6. The Certificate of Appointment of Operating Manager for the United States of the respondent's mine is also set out in full in the Statement of the Case, *infra*, pp. 9-11. The Regulations for the Operation of Coal Mines under Government Control are printed in the Appendix to the Brief for the United States, Pet. Brief, pp. 100-137.

STATEMENT OF THE CASE

This is an action to recover just compensation for the respondent's coal mine which was taken from it May 1, 1943, by the Secretary of the Interior and was thereafter until October 12, 1943, possessed and controlled by the United States (R. 1-2). The Court of Claims held that the mine had been taken and ordered judgment for the respondent in the sum of $2,241.26 representing the amount of increased wages which the respondent paid to its miners by direction of the Government during the period of United States possession (R. 41-47, 48).

The facts of the case are:

A

General Aspects of Coal-Mines Labor Dispute of 1943 and Government Seizure

1. *Events leading to Government seizure of mines.* When the United States entered World War II, the employment of a large majority of all bituminous coal miners was governed by contracts between mine operators and the United Mine Workers of America (R. 4-5). These contracts were to expire March 31, 1943, by their terms (R. 5).

Early in March, 1943, representatives of the operators and UMWA started negotiations in an effort to agree upon terms and conditions of employment which might succeed those of the contracts expiring March 31 (R. 5). The union made various demands and announced that it would challenge the "Little Steel" formula of the National War Labor Board which limited wage increases to 15 per cent. of January 1, 1941, pay (R. 5). On March 19, when no agreement had been reached, the operators proposed an extension of the existing contracts to April 30, pending continued negotiations, but the union thought negotiations should continue only upon the understanding that any terms and conditions agreed upon would be retroactive to April 1 (R. 5). The operators then appealed to the

President to intervene (R. 5). Upon a request of March 22 by the President, the operators and the union agreed to extend negotiations and the existing contracts for one month beyond April 1 with the understanding that any wage adjustments in a new agreement be retroactive to April 1 (R. 6).

Negotiations continued without apparent progress to an accord until on April 9 the southern operators asked the War Labor Board to take jurisdiction of the dispute, and on April 12 they made a similar request to the President (R. 6-7). In the meanwhile, on April 8, 1943, the President issued Executive Order No. 9328 (8 F. R. 4681) for "holding the line" of wages and prices (R. 7). The UMWA then offered to revise its wage demands by substituting therefor a guaranteed 6-day work week, and on April 13 the Director of the United States Conciliation Service and the President's personal representative in the negotiations made a similar suggestion (R. 7). Each proposal was rejected by the operators (R. 7).

On April 22, the Secretary of Labor certified the issues of the dispute to the War Labor Board (R. 7). The Board assumed jurisdiction and initiated proceedings to settle the matter (R. 7). The union, however, refused to participate in the proceedings and announced that it was no longer bound to continue the production of coal (R. 7). Strikes began in certain mines (R. 7). On April 27, after a fruitless directive to the union to end the spreading strikes, the Board referred the matter to the President (R. 7-8).

The President appealed on April 28 to the union to resume work and present the case to the War Labor Board (R. 8-9). He informed the union that, if work were not resumed by May 1, he would exercise his power as President and as Commander-in-Chief of the armed forces to protect the national interest and to prevent further interference with the prosecution of the war (R. 9). The union

replied that it believed that collective bargaining should be resumed (R. 9-10).

By April 30 the production of bituminous coal throughout the nation had virtually ceased as a result of the UMWA strikes (R. 9).

2. *Government seizure of the mines.* On May 1, 1943, the President issued Executive Order No. 9340 (8 F. R. 5695), *infra*, pp. 48-49, authorizing and directing the Secretary of the Interior "to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, . . . and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal" (R. 10).

Thereafter on the same day, the Secretary issued an "Order for taking possession" (8 F. R. 5767) whereby he took possession of some 3,000 mines, including all those of substantial size (R. 12-13). The terms of the order were:

> "By virtue of the authority vested in me by the President of the United States, I hereby find from the available information that a strike or stoppage has occurred or is threatened in each of the bituminous coal mines operated by the companies specified in Appendix A attached hereto, and therefore take possession of each such mine including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine and the distribution and sale of its products, for operation by the United States in furtherance of the prosecution of the war.
>
> "The President of each company (or its chief Executive officer) specified in Appendix A attached hereto, is hereby and until further notice designated Operating Manager for the United States for such mine and is authorized and directed, subject to such supervision as I may prescribe, and in accordance with regulations to be promulgated by me, to operate such mine and to

do all things necessary and appropriate for the operation of the mine, and for the distribution and sale of the product thereof.

"All of the officers and employees of the company are serving the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"No person shall interfere with the operation of the mine by the United States Government, or the sale or distribution of the product thereof, in accordance with this order.

"The Operating Manager for the United States shall forthwith fly the flag of the United States upon the mining premises, post in a conspicuous place upon the premises on which such mine is located a notice of taking possession of the mine by the Secretary of the Interior, and furnish a copy of such notice to all persons in possession of funds and properties due and owing to the company.

"Possession and operation of any mine may be terminated by the Secretary of the Interior at such time as he should find that such possession and operation are no longer required for the successful prosecution of the war."

Also on May 1, 1943, the Secretary of the Interior[1] promulgated his Order No. 1808 whereby he set up an organization to supervise and direct the operation of the

[1] By his Order No. 1807 issued May 1, 1943, the Secretary of the Interior delegated his power and authority under Executive Order No. 9340 to himself as Solid Fuels Administrator and to the Deputy Solid Fuels Administrator (R. 13). By his Order No. 1847 issued July 27, 1943, the Secretary revoked the previous delegation of authority to the Solid Fuels Administrator and the Deputy Solid Fuels Administrator and redelegated such authority to himself as Coal Mines Administrator and to the Deputy Coal Mines Administrator. As action by the Secretary thereafter was taken by him variously as "Secretary of the Interior", "Solid Fuels Administrator for War", and "Coal Mines Administrator" and as his authorities as such were substantially the same, he is referred to for convenience throughout this brief as "Secretary of the Interior" without regard to the designation of his formal capacity in respect of any particular action. Likewise, as his deputies exercised that same authority, action taken by them is referred to herein at times as action by the "Secretary of the Interior".

mines in his possession (R. 13-15). The field-office managers of the Bituminous Coal Division of the Department of the Interior were appointed Regional Bituminous Coal Managers with full powers of supervision and direction of the operation of the mines in their respective territories and with authority to issue specific directions as to the production, sale, and distribution of coal and all operating and financial arrangements of such mines (R. 13-14). The order made the compliance officers and other employees of the Bituminous Coal Division available to the Regional Managers to inspect the mines, and to report upon their operation, the sale and distribution of coal, and the manner in which the Operating Managers were discharging the responsibilities and obligations attaching to their service on behalf of the United States (R. 15). As for the Operating Managers appointed by the "Order for taking possession", *supra*, p. 5, Order No. 1808 described their status as follows:

> "The Operating Managers for the United States appointed by me to operate the several mines possession of which has been taken by me, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States, shall act in recognition of the resulting responsibilities and obligations, and shall be subject to the supervision and direction of the Regional Bituminous Coal Managers but shall not be officers or employees of the United States" (R. 15).

On or about May 1, 1943, the Secretary of the Interior sent a telegram to the chief executive officer of each of the producers whose mines had been taken directing him to continue operations at the mines for the United States pending receipt of formal instructions and appointment as Operating Managers (R. 18-19). These telegrams of interim authority and direction read as follows: (R. 18-19)

> "To assure production of coal necessary to win the war, President of the United States as Commander in Chief of the Army and Navy has directed me to

take over all bituminous coal mines of above-named company. You are being called upon as a loyal and patriotic American to serve as Operating Manager for the United States of the mines of your company and to continue operations at the mines for the United States. Formal instructions and appointment will issue upon your acknowledgment of this call to service by return wire in substantially following form:

"'I solemnly undertake to serve the United States and devote myself to the task of producing coal so that the work of winning the war may not falter. I am flying the flag of the United States on the mining premises to show that property is being operated exclusively for the United States and that all employees, including myself, who serve the mine are serving their country. The mine I am operating for the United States is known as the (insert name of your mine or mines and sign, giving your address.)'

"All officials and employees are directed forthwith to perform their usual functions and duties in connection with mine operation, sale and distribution of product. Pending receipt of formal instructions and appointment, you are authorized and directed to continue operations at the mines for the United States. Fly the flag of the United States on the mining premises. Do all things necessary to assure operation of mines Monday. In operation of mines use existing managerial set-up so far as practicable and take all steps within your power to encourage miners to return to work under present wages and working conditions with understanding that any eventual wage adjustment will be retroactive. If any act transpires requiring maintenance of order by use of military forces, communicate with Regional Bituminous Coal Manager who is manager of field office of the Bituminous Coal Division for area in which mine is located for transmission of request to proper officials. The above-named Regional Manager is available for further instructions if required. In respect to all ordinary production and distribution problems, proceed, as far as practicable, in accordance with previously prevailing policies. Set books up so as to keep separate the period of Government operation. Continue personnel organization as nearly as practicable in accord with normal organiza-

tion. Advise all supervisory employees of the program. Be governed by all applicable state and federal laws consistent with the order pursuant to which you are acting. In respect to any mines which you are reasonably certain will continue in normal, regular operation, you may submit a recommendation that operation of such mine on behalf of the Government be terminated.

"If you are not acting as chief executive officer of the company, this telegram is to be considered as directed to the officer who is so acting."

About May 12, 1943, when the chief executive officers of the various producers to whom the Secretary of the Interior had sent his telegram of May 1 had acknowledged the "call to service" in the manner suggested, the Secretary issued them certificates of appointment in the following form (R. 19-21):

"Whereas, the Secretary of the Interior has, pursuant to the provisions contained in the Executive Order dated May 1, 1943, taken possession of the coal mines listed in the appendix attached hereto, I hereby designate and appoint you as Operating Manager for the United States for such mines. The Operating Manager shall have the following duties and authority, and shall perform the following functions:

"(1) The Operating Manager shall, subject to such supervision as may be prescribed, and in accordance with such regulations as may be promulgated, operate the mines listed in the attached appendix and do all things necessary and appropriate for the continued operation of such mines, and for the production, distribution and sale of the product thereof.

"(2) The Operating Manager and all other officers and employees of the company shall serve the Government of the United States and shall proceed forthwith to perform their usual functions and duties in connection with the operation of the mine and the production, distribution and sale of the product thereof, and shall conduct themselves with full regard for their obligations to the Government of the United States.

"(3) The Operating Manager shall, in the operation of said mines, use the customary personnel so far as practicable and take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive, but he shall in no event use force; if any actual need has developed for maintenance of order by use of the military forces, he shall communicate with the appropriate Regional Bituminous or Anthracite Coal Manager of the Solid Fuels Administration for War for transmission of said request to the proper officials.

"(4) The Operating Manager shall maintain customary working conditions in the mines and customary machinery for the adjustment of workers' grievances and shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

"(5) The Operating Manager, in respect to all ordinary transactions, shall proceed, so far as practicable, in accordance with the customary procedures and policies of the company previously operating the mines, and shall continue to discharge specific arrangements, contractual or otherwise, entered into by the company and to incur obligations and to enter into contracts.

"(6) The Operating Manager shall enter into such financial transactions, either by way of receipt or expenditure, as are necessary to the continuation of the operation as a going enterprise, utilizing for this purpose any or all funds or properties due or owing or belonging to the company previously operating the mines, and shall draw upon the funds and accounts of the company, utilizing customary sources of credit or funds, and make all necessary disbursements.

"(7) The Operating Manager shall inform banks, creditors, debtors, and other persons having funds or properties due and owning or belonging to the company previously operating the mine that the rights to

the funds or properties are now in the possession of the Government of the United States and that the operation of the company's mines will until further notice be conducted for the Government.

"(8) The Operating Manager shall be subject to such accounting as the Solid Fuels Administrator for War may, from time to time, prescribe; and shall be governed by all orders, rules, and regulations issued by the Solid Fuels Administrator for War.

"(9) The Operating Manager shall set up and keep the books and records of the company in a manner such that the period of Government operation will be separate, or may be readily separated, from the operation of the company previously operating the mines as a private enterprise.

"(10) The Operating Manager shall, in such operation, distribution, and sale, comply with all applicable Federal and State laws and regulations.

"(11) The Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as 'Operating Manager for the United States (name of Company)', but the action in either case is for all purposes affecting the possession and control of the United States or the orders and regulations issued or to be issued relating thereto, to be considered as done by the Operating Manager.

"(12) This appointment shall terminate at the discretion of the Solid Fuels Administrator for War upon notice to the Operating Manager.

"(13) The Operating Manager shall, with respect to mines which he reasonably expects to continue in normal, regular operation, submit a recommendation that operation of such mines for the Government be terminated.

"(14) This appointment shall be effective immediately."

On May 5 and 6, 1943, the Secretary furnished placards and posters to the Operating Managers with instructions that they be put up at various places on mine property and in mining towns, and a supply of booklets carrying an address by the President was also furnished with instructions that they be individually distributed to the miners (R. 21-22). The placards portrayed the American Flag and beneath it the words:

UNITED STATES PROPERTY!

The Secretary of the Interior
Order for Taking Possession

followed by the text of the "Order for taking possession", *supra*, pp. 5-6, (R. 22).

On May 19, 1943, the Secretary of the Interior promulgated Regulations for the Operation of Coal Mines under Government Control (8 F. R. 6655) (Pet. Brief 100-116; R. 21). These Regulations superseded all prior orders and instructions governing the operation of the possessed mines inconsistent with the Regulations (Sec. 603.3; Pet. Brief 101) and otherwise provided in material substance:

a. All duties and authorities set forth in the Regulations were to be construed in the light of the primary purpose of Government intervention to maintain full production of coal for the effective prosecution of the war (Sec. 603.4; Pet. Brief 101).

b. Control of operations would be exercised only to the extent necessary to maintain full production. Title to the properties remained in the owners, and the Government in temporary possession would assert only rights necessary to accomplish maximum production. Possession and operation were to be terminated as soon as possible without injury to the war program (Sec. 603.5; Pet. Brief 101-102).

c. Each Regional Manager was authorized, subject to orders of the Secretary of the Interior, to exercise

full supervision and direction over the mines in his territory and to issue directions as to production, sale, and distribution of coal and as to all operating and financial arrangements for such mines (Sec. 603.12; Pet. Brief 104-105).

d. The operation of the mines would ordinarily be entrusted to the chief operating officer of the company formerly operating the mine who would act as Operating Manager for the United States while continuing to serve as an officer and employee of the company. Such person might be removed upon the request of the company in favor of an officer or employee nominated by the company and appointed by the Secretary of the Interior. Where the prompt cooperation of the company could not be secured, a person other than its officer or employee might be designated as Operating Manager by the Secretary (Sec. 603.15; Pet. Brief 106-107).

e. "*Status of Operating Managers*

"Any officer or employee of a mining company who, with the permission of, or without objection from, the said company, accepts designation as Operating Manager for the United States of the coal mines of said company shall, together with all other officers and employees, serve in full recognition of his responsibilities to the Government and subject to all orders and regulations of the Administrator, but he and all other officers and employees shall serve as agents and employees of the company with respect to all actions which they would have been empowered to take on behalf of the company in the absence of Government control of its property.

"The Operating Manager shall continue to be subject to all restrictions and limitations imposed by the company upon his exercise of his authority. In respect

of any action to which or in which the company requires its special consent or concurrence, the Operating Manager shall obtain such consent or concurrence before he takes such action. If consent is denied, the Operating Manager shall so report to the Regional Manager, stating the circumstances of the denial. The Regional Manager shall transmit the report to the Administrator, and the Operating Manager may proceed to take the action in question only upon direction of the Administrator.

"Designation of any person as Operating Manager for the United States shall not be deemed to constitute him an officer or employee of the United States within the meaning of Federal statutes governing personnel.

"The appointment of any Operating Manager shall terminate at the discretion of the Administrator upon notice to the Operating Manager." (Sec. 603.16; Pet. Brief 107-108).

f. "Duties of Operating Managers

"Operating Managers shall perform for their companies ordinary duties of management in accordance with established policies and practices, so far as consistent with these regulations and the instructions and orders of the Administrator and Regional Managers, and shall in addition perform all special duties placed on them as Operating Managers of the United States by these regulations, by their appointment instructions, so far as consistent with these regulations, and by such orders as the Administrator or the Regional Managers may issue.

"An Operating Manager is authorized to take all necessary action in the manner in which and through the officials by which it has been customarily accomplished and may, as should be necessary and convenient, take action either under his customary title and designation or as 'Operating Manager for the United

States, (name of Company)'"[2] (Sec. 603.17; Pet. Brief 108-109).

g. The Operating Manager should:

(1) Submit to the Regional Manager a statement defining the properties under his management (Sec. 603.21; Pet. Brief 109).

(2) Set up and keep books and records of the company so that the period of Government operation might be "readily separated from the operation of the company previously operating the mine as a private enterprise" (Sec. 603.21 (a); Pet. Brief 109-110).

(3) Render such accounting as the Secretary might prescribe (Sec. 603.21 (b); Pet. Brief 110).

(4) Enter into such financial transactions as were necessary to continue the enterprise, using the funds and property of the company, but making no major disbursements of any extraordinary nature without the approval of the Regional Manager (Sec. 603.22 (a); Pet. Brief 110).[3]

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[2] By Amendment No. 1 to the Coal Mines Regulations issued July 29, 1943 (8 F. R. 10712), this provision relating to the duties of operating managers was amended by changing the period at the end to a comma and adding:

"as hereinabove and hereinafter specified. No Operating Manager for the United States of any mining company is authorized or shall be regarded as having authority, express or implied, to bind or impose any liability on the United States or any of its officials or agents in the absence of a specific direction or order by the Administrator to that effect. Nor shall any operations of any mine properly in the possession and control of the Government, or the proceeds, earnings or liabilities of such mine properly in any event be, or be regarded as being, for the account or at the risk or expense of the Government except as a specific written direction or order to that effect shall have been given by the Administrator". (Pet. Brief 117-118).

[3] The general prohibition against making major disbursements of an extraordinary nature without the Regional Manager's approval was eliminated August 13, 1943, by Amendment No. 2 to the Regulations (8 F. R. 11344) *infra*, p. 20, Pet. Brief 126). The prohibition was continued, however, and even expanded to stop dividend payments and the incurrence of abnormal indebtedness by Section 801.26 of the same Amendment No. 2 in the case of the Operating Manager for the mines of any coal company which did not formally agree to accept financial responsibility for the operations under Government control, *infra*, p. 21 (Pet. Brief 136).

(5) Inform, if necessary, all third persons with whom business might be transacted that such transactions were being carried on "under the authority of the Government and the company, in accordance with customary procedures and policies", that the company remained subject to the usual methods of enforcement of its obligations, and that the Government expected that the acts and agreements of the company would be accorded the same consideration and effect as in the absence of Government control (Sec. 603.22 (b); Pet. Brief 110-111).

h. Customary working conditions should be maintained, and Operating Managers should use customary personnel and "take all steps to encourage miners to work under present wages and working conditions with the understanding that any eventual wage adjustments will be made retroactive" (Sec. 603.23 (a)-(d); Pet. Brief 111-112).

i. All officers and employees of the mines should be considered as called upon by Executive Order No. 9340 to serve the Government, but the Regulations should not be construed as recognizing such personnel as officers and employees of the Federal Government within the meaning of the statutes relating to Federal employment (Sec. 603.22 (d) (1); Pet. Brief 112).

j. Mining companies and their personnel and property were deemed to remain subject to all Federal and State laws and to the jurisdiction of Federal and State courts and agencies. Mining companies should remain subject to suit as theretofore with report to be made of any legal proceeding which involved question as to the rights of the United States (Sec. 603.24 (a) (b); Pet. Brief 112-113).

k. "The possessory interest of the United States in the properties of the companies is deemed to be pro-

tected by the criminal laws protecting United States property." (Sec. 603.24 (c); Pet. Brief 113).

l. The Regional Manager might issue instructions for the operation of a mine where prompt and effective cooperation of the company previously operating the mine could not be secured, Pending receipt of direction from the Secretary, the Regional Manager could deny access to the premises to "persons not contributing to the operation of the enterprise", prevent any interference with its operation, and see that the production of coal was continued (Sec. 603.30; Pet. Brief 113).

m. "*Removal of Operating Managers*

"Upon failure of an Operating Manager to comply with these regulations or to the orders of the Administrator or the Regional Managers or upon failure of a mining company to respect the action taken by its Operating Manager who is an official of the company, the Regional Manager shall report to the Administrator the desirability of the removal of the Operating Manager, with such recommendations for a substitute as he may wish to make." (Sec. 603.31; Pet. Brief 113-114).

n. Government control might be relinquished upon presentation of satisfactory assurances to the Secretary of the Interior that under restored private control full operation would be continued and upon agreement by the mining company ratifying all acts by the Operating Manager, releasing the Government from all claims by reason of its possession and control of the mines, and holding the Government harmless from all liability arising out of acts performed during the period of possession and control. (Sec. 603.40 (a); Pet. Brief 114-116). In the absence of such an agreement, the Secretary of the Interior might return the

property to the company retaining such assets and rights as may be necessary

> "to compensate for any reasonable expense incurred in the course of Government operation . . . and to meet all outstanding obligations incurred in connection with such operation. Pending an accounting and adjudication of all such claims, and of any other claims of interested parties, including any claims of owners based upon negligence in the management of the property, such portions of the property may be retained in Government control as shall appear to be adequate to cover all adjustments that may be required by such accounting and adjudication". (Sec. 603.40 (b); Pet. Brief 116).

The foregoing provision "n." of the Regulations was amended by Amendment No. 1 of July 29, 1943, to provide in substance as follows:

Government possession and control would be terminated upon the Secretary's determination that the requirements therefor specified in the War Labor Disputes Act, 57 Stat. 163, had been fulfilled. After termination, the Secretary might require the submission by any mining company of operating information relating to Government possession and control for the purpose of ascertaining the existence and amount of any claim against the United States (Pet. Brief 119).

The Operating Manager should advise the Secretary when, in his opinion, the requirements for termination of Government possession and control had been fulfilled (Pet. Brief 119).

Upon termination of possession and control, the mining company might elect to execute alternative instruments (Pet. Brief 120):

Instrument No. 1 adopting and ratifying all acts and omissions of the Operating Manager and agreeing that the Government and its officers should not be subject to claims by anyone by reason of its possession and

control. The delivery of Instrument No. 1 should constitute a waiver of any rights which the Government might have to an accounting with respect to its operations, and a discharge of the Operating Manager from any liability to the Government for actions taken by him (Pet. Brief 120-121).

Instrument No. 2 reserving the right to assert a claim for damage allegedly suffered by it as the direct result of a specific direction of the Secretary, but otherwise the same as Instrument No. 1, *supra*. Instrument No. 2 should specify the direction causing the damage, the action taken pursuant to the direction, and the nature of the damage. The delivery of Instrument No. 2 should constitute the same waiver by the Government as Instrument No. 1 with reservation, however, of the right to offset benefits of Government possession and control against any claimed liability (Pet. Brief 121-122).

If neither Instrument No. 1 nor Instrument No. 2 should be executed, the Secretary might assume that the company reserves the right to claim that operations had been for the account of the Government and that the Operating Manager and the company were accountable to the Government for the proceeds from operations. Pending such an accounting, the appointment of the Operating Manager should continue in force for such purposes. The Operating Manager and the company should forthwith furnish to the Secretary detailed accounting data certified in part by a certified public accountant and in remaining part by an officer of the company. Other pertinent data should be furnished as directed. Agents of the Government should have access to the books and records of the company in order to check data submitted. No action taken pursuant to the provisions of the amended Regulations should be deemed to be acquiescence by the

Secretary in any claim that the Government was liable for any action during its possession and control (Pet. Brief 122-125).

On August 13, 1943, by Amendment No. 2 to the Regulations, the Secretary of the Interior provided an "Interim procedure for confirmation of financial responsibility by mining company" whereby a mining company might, during the period of Government possession, deliver an instrument agreeing that all the acts and omissions of the Operating Manager had been and would be for the company's account, ratifying all the acts and omissions of the Operating Manager and agreeing that the Government should not be subject to any claims by reason of its possession and control, and certifying that the company would not dispose of its funds or incur any indebtedness which would impair its capital so as to jeopardize maximum production at its mines (Pet. Brief 126-127). The delivery of such an interim instrument should constitute a waiver of all rights of the Government to an accounting and a discharge of the Operating Manager from liability to the Government for his actions (Pet. Brief 127-128). The instrument should constitute a reservation of the company's right to assert a claim for damage allegedly suffered or threatened to be suffered as a direct result of specific direction of the Secretary provided timely specification of the direction, the action taken pursuant thereto, and the nature of the damage be made in respect of a direction made prior to the issuance of the amended Regulation and similar timely protest be made in respect of a direction made subsequent thereto (Pet. Brief 128-130). Upon the dispatch of such a protest, the direction should be suspended as it applied to the Operating Manager pending the Secretary's further directions (Pet. Brief 131). If the Secretary should confirm the direction, the company should be deemed to have reserved right

to assert a claim for damage allegedly resulting directly therefrom while the Government should be deemed to have reserved all rights to offset benefits from its possession and control and otherwise to defend against such claim (Pet. Brief 131-132). Failure to file a protest should be regarded as acquiescence in the company's liability for the consequences of action taken by the operating manager pursuant thereto (Pet. Brief 132). After the execution of an interim instrument of financial responsibility, the company might terminate the effectiveness of it as to future acts and omissions of the Operating Manager upon ten days' notice to the Secretary (Pet. Brief 133). No action taken pursuant to the provisions of Amendment No. 2 should constitute acquiescence by the Secretary in a claim against the Government arising out of its possession and control (Pet. Brief 134).

Also by Amendment No. 2, the Secretary ruled that, in the absence of an agreement "confirming" its financial responsibility for operations under Government possession and control, the Operating Manager should make no major disbursements of an extraordinary nature or dividend payments or incur any abnormal indebtedness without the approval of the Secretary. *supra*, p. 15, footnote 3 (Pet. Brief 136). It was further provided that the Secretary might direct such Operating Manager to submit certified periodic accountings of the operation of the mines and other data as to pertinent matters and that Government agents should be given reasonable access to all books and records of the company (Pet. Brief 136-137).

3. *Effect of Government Seizure upon Strike and Subsequent History.* On May 2, 1943, the next day after the taking of the mines pursuant to Executive Order No. 9340, the Secretary of the Interior conferred with the UMWA president and asked that the miners be recalled to work

pending a survey of the situation brought about by Government seizure (R. 15). Following this conference, the union announced a 2-week "truce" in the dispute beginning May 4 and requested the miners to "cooperate with your government" (R. 15). Immediately following the truce announcement President Roosevelt delivered a radio address in which he said that the War Labor Board was prepared to give the miners a fair hearing with wage adjustments, if any, retroactive to April 1 (R. 16). The miners began returning to work May 4, and operations became normal several days thereafter (R. 16). On May 17, after another appeal by the Secretary of the Interior, the UMWA announced an extension of the true to May 31 (R. 16).

As soon as operations had returned to normal, the War Labor Board resumed its hearings but still without participation by the UMWA (R. 16). On May 25, it rendered a preliminary decision denying certain of the miners' demands and granting only those for an increase from $20 to $50 in vacation pay and for shifting certain occupational charges, such as for miners' lamps, from the workers to the operators (R. 16). In accordance with the Board's suggestion that the demands for a guaranteed 6-day work week and for portal-to-portal pay be negotiated further, negotiations were resumed between the operators and the union May 26 (R. 16). The talks became deadlocked (R. 16). On May 31, the expiration date of the truce, the Secretary of the Interior instructed the mines to make work available on June 1 (R. 16). On that day, however, another general strike started (R. 16).

On June 3, the President of the United States ordered the miners to return to work June 7 (R. 16-17). The UMWA thereupon voted to return to work on June 7 and extended the truce to June 20 (R. 17). Most of the miners returned to work on the day specified although absenteeism and sporadic strikes continued to prevail thereafter in

various sections (R. 17). Contract negotiations were renewed but brought no agreement (R. 17).

The War Labor Board rendered its final decision in the dispute June 18, 1943 (R. 17). It denied the portal-to-portal pay demand as beyond its jurisdiction and the demand for a guaranteed work week, and it extended the contracts which expired March 31, 1943, as modified by its May 25 preliminary decision, *supra*, p. 22, until March 31, 1945, unless changed by agreement before then (R. 17). The union announced that the miners would work for the Government under the decision but not for the operators (R. 17). Notwithstanding this announcement, a third general strike started June 21 (R. 17). Following an order by the UMWA to work under the Government until October 31, 1945, and a public statement by the President, the men gradually returned to work (R. 17-18). By July 6, the strike had ended although production remained substantially below pre-strike levels (R. 17).

On August 16, the Secretary of the Interior instructed all Operating Managers to supply information, including their opinion, as to whether productive efficiency had been restored to the level preceding Government control so that he could determine whether to release the mines (R. 25). Upon the information thus obtained, the Secretary terminated control of 48 mines on August 20 and 23 and of 370 mines on September 4 (R. 25).

On October 12, 1943, the Secretary of the Interior issued an order terminating Government control of all the mines not previously released (R. 25). This order was as follows:

> "On the basis of available information and evidence, and after consideration of all the circumstances, and in accordance with the provisions of the War Labor Disputes Act of June 25, 1943 (Pub. No. 89, 78th Cong., 1st Sess.), I find that the possession and control by the Government of any and all of the coal mines now in the possession of the Government should be terminated.

"Accordingly, I order and direct that possession and control by the Government of any and all mines now in the possession of the Government, including any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines and the distribution and sale of their products, be, and they are hereby, terminated and that there be conspicuously displayed at the mining properties of each of such mines copies of a poster to be supplied by the Coal Mines Administration and reading as follows:

"NOTICE

"Government possession and control of the coal mines of this mining company have been terminated by order of the Secretary of the Interior.

"Provided, however, that nothing contained herein shall be deemed to preclude the Administrator from requiring the submission of information relating to operations during the period of Government possession and control as provided in Section 40 of the Regulations for the Operation of Coal Mines under Government Control, as amended (8 F. R. 6655, 10712, 11344), for the purpose of ascertaining the existence and amount of any claims against the United States so that administration of the provisions of Executive Order No. 9340 (8 F. R. 5695) may be concluded in an orderly manner; and Provided further, That except as otherwise ordered, the appointments of the Operating Managers for the mines affected by this order shall continue in effect." (R. 25-26)

B

Respondent's Position in Labor Dispute and Government Seizure

1. *Position of respondent in events leading to Government seizure of mines.* The respondent, Pewee Coal Company, a Tennessee corporation, is engaged in the business of mining and marketing bituminous coal (R. 3). In 1940, upon land leased for a term of 40 years, it opened a mine at Garland, Tennessee, which passed from development to

production early in 1941 (R. 4). Thereafter it continuously produced coal from this mine until April 1943 except during a national strike of miners early in 1941 (R. 4).

In the spring of 1943, the respondent was a member of Southern Coal Operators Association (R. 4). Its 150 mine workers were members of the UMWA (R. 4). By reason of certain agreements between the Operators Association and the UMWA, the terms and conditions of employment at the respondent's mine were governed by the contracts between mine operators and the union which expired March 31, 1943, and were extended by mutual agreement of the parties to April 30, *supra*, pp. 3-4 (R. 4-5).

Although there is no explicit finding upon the subject, the respondent's mine presumably was shut down on or before April 30 by the general strike then existing, *supra*, p. 5.

2. *Government seizure of respondent's property.* Respondent was among the companies named in the "Order for taking possession", *supra*, pp. 5-6, whose property was taken by the Secretary of the Interior for operation by the United States (R. 12).

Respondent's president Frank Garland was designated by that Order as well as by the telegram of May 1, 1943, from the Secretary, *supra*, pp. 7-9, as Operating Manager for the United States and was instructed thereby to operate the mine and do all things necessary and appropriate for the operation of the mine and for the distribution and sale of the coal produced (R. 18-19). In the absence of Mr. Garland from the mine at the time the telegram of May 1 was received, respondent's superintendent wired the Secretary his undertaking to serve the United States in the language suggested by the telegram (R. 19). The superintendent raised the American flag at the mine and carried out the other instructions of the telegram (R. 19).

On May 12, having been advised that no acceptance of his designation as Operating Manager had been submitted by him, Mr. Garland telegraphed the Secretary in the language suggested and confirmed both the prior undertaking of the superintendent and his own (R. 19). On the same day the Secretary sent to Mr. Garland the formal certificate of appointment as Operating Manager for the United States which he issued to the chief executive of the other companies involved in the seizure (R. 19-20).

The placards portraying the American flag with the notice "United States Property!", *supra*, p. 12, were posted on the mine property in accordance with the Secretary's instructions (R. 21-22).

3. *Government control of respondent's property.* Shortly following the issuance of the Secretary of the Interior's "Order for taking possession" and by reason of the events described next above, the Government was in possession of the respondent's property. The United States immediately undertook to operate the mine and otherwise to exercise control over it especially through the duties imposed upon and authority vested in Mr. Garland by the terms of his appointment as Operating Manager for the United States and the Regulations for the Operation of Coal Mines under Government Control, *supra*, p. 25.[4]

The respondent's miners returned to work during the first week of May (R. 16). The operation of the mine thereupon ran into serious production difficulties (R. 39). First, from its reopening in May until July 6, 1943, the production of the mine was reduced through the loss of substantial working time because of the strikes in June and July, *supra*, pp. 22, 23 (R. 26). Also in May a "squeeze"

[4] Although the respondent's superintendent Mason had transmitted "acceptance" of the initial appointment as Operating Manager and apparently had assumed to act accordingly, it is believed (if it should be material) that Garland's later acceptance and affirmance of the superintendent's undertaking served to identify Mason's activities with Garland's, *supra* (R. 19).

or shifting and collapse of the roof of the mine developed in one entry, with the result that mining in that location became impracticable early in July (R. 30-31). More serious, in July the main entry upon the continued advance of which the life of the mine depended was driven into an extensive "fault" or low-coal area (R. 31-32). After a futile effort had been made to drive through the fault in July, the mine superintendent and the respondent's engineer recommended that advance work be stopped and the mine be closed (R. 32-33). Operating Manager Garland, however, decided to continue operations (R. 33). The work thus continued (R. 33).

Under these circumstances, the mine was operated at a substantial loss: during the months of May, June, and July, the net operating loss was at the rate of approximately $1.30 per ton of production and totalled slightly more than $20,500 (R. 40). This rate of loss, together with the payment of more than $2,200 made June 30, 1943, to the miners required by the Secretary to conform with the War Labor Board's decision, led Mr. Garland to write the Secretary July 22, 1943, stating that the mine could not meet its current bills, payroll, and other charges and asking that funds be supplied in order to keep the mine in production (R. 31). On July 31, the Secretary denied Mr. Garland's request, using in part the terms of that portion of Amendment No. 2 to the Coal Mine Regulations promulgated July 29 which recited that no mining operation should be for the account of the United States except by specific direction of the Secretary, *supra*, p. 15 (R. 31-32). By letter of August 3, Mr. Garland protested any requirement that the respondent absorb the loss attendant upon Government operation of its mine and asked that the Secretary issue a specific order to impose liability on the United States in this case (R. 35-36). No response was made to Mr. Garland's letter of August 3 until September 24 when the Secretary's deputy wrote him denying his request "on the basis of all the facts and circumstances"[5] (R. 37-38).

[5] The letter of September 24, 1943, from the deputy referred to a radio speech made July 20, 1943, at Cincinnati, Ohio, wherein he had stated that the Gov-

Mr. Garland, thereupon wrote the deputy advising him in substance that production at the property had been continued upon the assumption that operations were for the account of the Government and that, in view of the Government's position that respondent was responsible therefor, advance work at the mine was being discontinued and production would cease shortly (R. 38). The deputy replied on October 7 that "in the absence of a contrary direction by the Administrator, where the management has deemed it advisable for sound operating reasons to abandon operations at any particular mine, it may do so" (R. 38-39). After Mr. Garland's letter of September 28, no further advance work was performed in the mine, with the exception of a brief period in November, 1943, after Government control under the order of May 1 had been terminated[6] (R. 39).

As required by his appointment and the Regulations, Mr. Garland operated the mine for the United States in substantial conformance with the respondent's policy and practice obtaining prior to the seizure: management and personnel remained as before and performed their customary functions in the regular course of business; no changes were made in internal operating methods; books and records of account were maintained in the same manner; and the mining operations were not shown to have

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ernment "has not and does not intend to advance money to coal mining companies" (R. 37). It also called Mr. Garland's attention to Amendments Nos. 1 and 2 to the Coal Mines Regulations which, according to the deputy, "provide a procedure for mining companies to assert claims for liability against the Government, directly resulting from any specific direction or order" (R. 37). Amendments Nos. 1 and 2 to the Regulations are summarized, *supra*, pp. 15, 18-21, and set out in full in the Appendix to Brief for the United States, pp. 117-137. The Amendments provided procedures for mining companies to assert claims against the Government, but a condition of such procedures was that *the claimant agree the entire operation of its mine by the Government had been for the account of the claimant* except for damages represented to result directly from a specific direction of the Administration. By letter of September 17, Mr. Garland had "reiterated" his advice that "we are operating this mine for the account of the United States Government" (R. 37).

[6] In January 1944, respondent obtained permission from its landlords to abandon the mine (R. 34). The mine was thereupon "robbed" of the coal remaining in the pillars supporting its roof and permanently closed in the spring of 1944 (R. 39).

been in any respect different because of Government control (R. 40-41). In so managing the mine, Mr. Garland was at all times subject to removal from his position at the discretion of the Secretary of the Interior (Sec. 603.16 (d); Pet. Brief 108).

In connection with the routine administration of the mine by the Operating Manager in accordance with the general direction of the Government to continue operations, there were instances of specific instruction to him as to the details of management. Many of these instructions were embodied in the conditions of Mr. Garland's interim designation and formal appointment as Operating Manager and in the Coal Mines Regulations. Among the more significant of such instructions were to fly the flag of the United States on the mine premises, *supra*, p. 8; set books up so as to keep separate or render easily separable the period of Government operation, *supra*, p. 8, and Pet. Brief 109-110; enter into financial transactions necessary to continuation of the operation, using funds and properties of the respondent, *supra*, p. 10; inform banks, creditors, debtors, and other persons having funds and properties of the respondent that its rights thereto were in the possession of the Government and that the operation of the mine would be conducted for the Government, *supra*, p. 10; to be subject to such accounting as might be prescribed and to be governed by all orders, rules and regulations issued by the Secretary of the Interior, *supra*, p. 11, and Pet. Brief 108; to take action either under his customary title or as "Operating Manager for the United States" with the action in any case affecting Government possession and control to be considered as done by the Operating Manager, *supra*, p. 11, and Pet. Brief 108-109; to make no major disbursements of an extraordinary nature without the approval of the Regional Manager, *supra*, p. 15, Pet. Brief 110; to encourage miners to work with the understanding that eventual wage adjustments would be made retroactive,

supra, p. 16, Pet. Brief 111-112; and, if the respondent should not ratify all his acts as Operating Manager for the United States and release the Government from liability for its possession and control, reserving only the right to assert a claim for damage suffered as the direct result of a specific direction of the Government, to account to the United States for the proceeds from operations during Government possession and control and to make no dividend payments or incur any abnormal indebtedness without the consent of the Secretary of the Interior, *supra*, p. 21, Pet. Brief 136.

Furthermore, there were specific operating instructions issued to Mr. Garland by the Secretary outside those contained in his designation and appointment as Operating Manager or in the Regulations. Such instructions required, among other things, the posting of notices that the mine was United States property, *supra*, p. 26 (R. 21-22); the payment of increased vacation pay and refund of lamp rentals to employees (R. 21-22); the making of daily long-distance telephone reports of employment and production to the Regional Manager (R. 26); the reporting of costs and selling prices of mine-store supplies to the Secretary (R. 22); the operation of the mine six days a week (R. 23); and the submission of a certified statement of account for the period of Government operations pursuant to Sec. 801.40[7] of the amended Coal Mines Regulations (R. 27-28).

The Court of Claims made no findings as to the total cost to the respondent of Mr. Garland's compliance with the Government's instructions to him as Operating Manager. It did find that the cost of paying increased vacation pay and refunding lamp rentals was $2,241.26 (R. 23); the cost of the daily telephone calls was 60 cents a day or $57.60 for the 96 working days from May 17 to September 3, 1943 (R. 25); and the cost of the employment

[7] This section of the Regulations was referred to in the findings under its original designation of "Section 40" before it was incorporated in the Code of Federal Regulations (R. 27).

of certified public accountants to prepare the Operating Manager's accounting was $125 (R. 29-30). Accordingly, the record shows that the respondent expended at least $2,423.86 for Mr. Garland's compliance with specific instructions from the Secretary, of which all but $125 was included in the computation of the net loss of $36,128.96 incurred in the operation of the mine during Government possession and control.

The respondent has been reimbursed for none of these expenses resulting directly from the Operating Manager's compliance with specific instructions (R. 29).

4. *Release of property by the Government.* The circumstances under which respondent's mine was taken and operated by the United States showed practically from the inception that the Government purposed to restore it to the control of the respondent as soon as there might be assurance that the miners would work for the private owners under terms established in accordance with wartime procedures for the settlement of labor disputes, *supra*, p. 6. Return of the mine to the respondent conditioned upon assurance of continued normal production became definite when, after the passage of the War Labor Disputes Act of June 25, 1943, 57 Stat. 163, the Coal Mines Regulations were amended to provide for the termination of Government possession and control upon the pertinent requirements of Section 3 of that Act (57 Stat. 164) which were, briefly, that any mine taken by the United States by reason of labor disturbance should be returned within 60 days after restoration of productive efficiency (Coal Mines Regulations, Sec. 801.40; Pet. Brief 119).

The Secretary of the Interior communicated with Mr. Garland July 29, August 16, and September 18, 1943, asking for information upon which he could determine whether respondent's mine might be released under the foregoing standards of the War Labor Disputes Act (R. 26-27). In response, Mr. Garland advised the Secretary that produc-

tive efficiency had not been restored (R. 26-27). Despite this advice, the Secretary promulgated his Order of October 12, 1943, *supra*, p. 23, terminating Government possession and control of respondent's property, but retaining the right to require the submission of information to ascertain the amount of any claims against the United States and continuing in effect the appointment of Mr. Garland as Operating Manager (R. 25-26).

In the absence of an agreement by the respondent ratifying and adopting Mr. Garland's acts as Operating Manager, the Secretary directed Mr. Garland on October 25, 1943, to comply with the provisions of Section 801.40 of the Regulations for an accounting of the mines' operations during the period of Government possession and control (R. 26, 27-28). On November 30, 1943, respondent submitted the required accounting together with a claim for reimbursement of the losses suffered in operating the mine for the United States (R. 28-29). The Secretary replied on December 14, 1943, advising the respondent that any claim must be prosecuted in accordance with the statutes and regulations relating to claims against the United States and that the data supplied by respondent was being compiled for use of the Government if the respondent should prosecute its claim (R. 29).

The Court of Claims held that the United States had taken respondent's property within the meaning of the Fifth Amendment and "is liable for whatever consequences flow therefrom" (R. 45). It thereupon held that the proof did not show that the respondent's operating loss was caused by the Government's seizure (R. 44). It finally held that the payment of increased compensation of $2,241.26 to miners which the Secretary of the Interior had directed to be made in accordance with the War Labor Board's decision was "an extra expense of operation oc-

casioned by the Government, for which we think plaintiff is entitled to recover" (R. 47). Judgment for $2,241.26 was accordingly entered (R. 48).

Judge Madden dissented on the ground that, whether there was a taking of respondent's property or not, the Court had not found what the losses to respondent would have been if the Government had not intervened and the strike had continued (R. 48).

SUMMARY OF ARGUMENT

A. The United States took property from the respondent on May 1, 1943, by seizing and operating its bituminous coal mine in order to assure production of coal needed to win the war.

The United States took constructive possession of the mine through the Secretary of the Interior's "Order for taking possession" issued May 1, 1943. It took actual possession of the mine through its agent, the Operating Manager for the United States. The telegram of May 1, 1943, from the Secretary of the Interior appointing an Operating Manager of respondent's mine for the United States and the acceptance of the appointment by the respondent's superintendent on that day constituted the manager an agent of the United States for taking possession of the mine and operating it for the Government.

The taking of the respondent's mine by the Government was similar to the Federal seizure and control of the railroads in World War I. The circumstances attendant upon the taking and operation of the railroads were so close to those affecting the seizure of the respondent's mine as to indicate that the legal incidents of possession were the same.

In taking respondent's mine, the Government took a recognized legal interest in the respondent's property, both real and personal, which will be protected by the Fifth Amendment.

United States v. *United Mine Workers*, 330 U. S. 258, suggests strongly that the Government's taking of respondent's mine was compensable under the Fifth Amendment. Although the Court in *United Mine Workers* did not examine or determine the relation existing in the 1946-47 seizure of the coal mines then before it, the practical effect of the holding that during such seizure the miners were employees of the Government is that the United States acted as proprietor of the mines.

B. Compensation for the taking of respondent's mine would include the rental value of the property at the time of taking and also the net losses suffered in its operation by the Government. As rental value is not shown in the record, whereas the net losses are proved, the respondent was entitled to recover only the amount of the loss. Because the judgment entered by the Court below represents an amount less than the loss suffered by respondent in the Government's operation of the mine, the judgment should not be disturbed except as the Court may direct judgment for the larger amount to which respondent was entitled.

ARGUMENT

Cessation of production in the bituminous coal fields in the spring of 1943 brought the United States face to face with the question of what exercise of its plenary power successfully to prosecute the war it should invoke to resume and maintain the necessary mining of coal. See *Hirabayashi* v. *United States*, 320 U. S. 81, 93. The respondent has no means of knowing what all the influences were which induced the United States to choose to accomplish its purpose through seizure of the producing properties rather than through any of the number of other ways available to it. See Hoague, Brown and Marcus, *Wartime Conscription and Control of Labor*, 54 Harv. L. Rev. 104; *Mobilization for Defense*, 54 Harv. L. Rev. 278; Teller, *Government Seizure in Labor Disputes*, 60 Harv. L. Rev. 1017, 1030; cf. *Highland* v. *Russell Car and Snow Plow Co.*, 279 U. S. 253.

The case, as stated herein, *supra*, pp. 3-33, shows clearly that in the crisis the United States elected to use and did use its right of eminent domain to seize and operate the mines through executive action of the Secretary of the Interior pursuant to the order of the President.

A

The United States Took Respondent's Property Within the Meaning of the Fifth Amendment.

The respondent asserts that the United States, in seizing and operating the mines in order to assure the production of coal needed to win the war, took its property within the meaning of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation". The taking of its property was complete on May 1, 1943, as shown by the expressions of Government possession and exercise of Government control in the "Order for taking possession" issued May 1, 1943, by the Secretary of the Interior under the authority of Executive Order No. 9340; in his appointment on that day and on May 12, 1943, of an Operating Manager for the United States over respondent's mine; in the various general orders and regulations and specific instructions issued by the Secretary during the period of Government operation; and in the operation of the mine for the purposes of the United States by the Operating Manager as an agent of the United States, all as fully set forth in the Statement of the Case, *supra*, pp. 3-33.

1. *The United States Took Possession of Respondent's Mine.* The plain intendment and effect of the Secretary's "Order for taking possession" of May 1, 1943, was to remove possession and control of the Pewee mine from the respondent to the United States. The order itself stated that as its effect: "I . . . take possession of each [specified] mine . . . for operation by the United States in furtherance of the prosecution of the war", *supra*, pp. 5-6.

The validity of Executive Order No. 9340 authorizing and directing the Secretary of the Interior to take possession and do everything necessary for or incidental to the production, sale, and distribution of coal is not here in question, and neither is that of the Secretary's "Order for taking possession". In these circumstances, it must be presumed that the Secretary took possession of respondent's mine as he specifically stated he did. *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 14, 15; *Klamath and Moadoc Tribes* v. *United States*, 296 U. S. 244, 253; *Wilkes* v. *Dinsman*, 7 How. 89. It is immaterial in this case, however, whether possession was obtained by the issuance of the "Order for taking possession" *per se*. Regardless of the effect of that order, it will be shown that actual physical possession of the mine and its connected property was taken by the Government.

a. *The Operating Manager for the United States Assumed Possession and Control of the Mine as Agent of the United States under authority of the Secretary of the Interior.* On May 1, 1943, at the outset of Government possession and control, respondent's superintendent accepted a temporary or interim appointment as Operating Manager for the United States of the Pewee mine by the Secretary of the Interior with both the authority and the obligation to continue operations at the mine for the United States, *supra*, pp. 25-26. Soon thereafter, respondent's president sent his acceptance of the same appointment to the Secretary and notified the Secretary that he confirmed the superintendent's acceptance.

The telegram of appointment addressed by the Secretary to the chief executive officer of respondent called upon that officer to "serve as Operating Manager for the United States" and to continue operations "for the United States", *supra*, pp. 7-9.[8] It advised the Operating Man-

[8] Order No. 1808 issued the same day by the Secretary as an organizational order directed similarly that "Operating Managers, as well as all other officers, mine workers, and employees, shall serve on behalf of the United States . . .", *supra*, p. 7.

ager that formal instructions and appointment would issue upon his acknowledgment of "this call to service". The terms of an acknowledgment were suggested whereby the Operating Manager should undertake "to serve the United States and devote myself to the task of producing coal". The suggested acknowledgment recited that the American flag was being flown on the mine premises to show that the "property is being operated exclusively for the United States and that all employees, including myself, who serve the mines are serving their country."

The Secretary's telegram went on to give instructions to the Operating Manager as to the manner in which he should conduct operations for the United States. Among these instructions was one directing all officers and employees of the respondent "to perform their usual functions and duties in connection with mine operation, sale and distribution of product". Another required the Operating Manager to use the accustomed managerial and personnel organization and to proceed, so far as practicable, in accordance with previously prevailing policies.

Respondent's superintendent, upon his receipt of the telegram, immediately accepted the appointment in the exact language of the suggested acknowledgment and complied with all the Secretary's instructions. A few days later, placards portraying the American flag and bearing prominently the notice "UNITED STATES PROPERTY!" were posted on the mine premises as ordered by the Secretary of the Interior.

The appointment of May 1, 1943, and its acceptance created a relationship of agency between the United States as principal and the Operating Manager as agent. It is established that agency results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Restatement of Law, 1 Agency, § 1. Every element and detail of the appointment of the Operat-

ing Manager of respondent's mine indicate the existence of agency in him to operate the mine for the United States, and his operation of the mine in conformance with his authority was for the United States. Restatement of Law, 1 Agency, §§ 140, 144, 149.

Under these circumstances, no real doubt could exist that on May 1, 1943, the Government took actual possession of respondent's mine and its facilities. *Krug* v. *Fox*, 161 F. 2d 1013 (CA 4). The respondent submits that this Court has so held in the light of the implications of *United States* v. *United Mine Workers*, 330 U. S. 258, 263, 284, 289, decided upon the closely similar set of circumstances attendant upon a later seizure of the mines by the United States. The only distinction between the factual situation upon which the *United Mine Workers* decision was premised and that disclosed here, at least in respect of the question of possession, is that there the seizure had been accomplished by the Secretary of the Interior as directed by an Executive Order issued by the President under his constitutional authority as such and as Commander-in-Chief of the Army and Navy and the authority conferred upon him by the War Labor Disputes Act, 57 Stat. 163. Here, of course, the taking was completed before the enactment of the War Labor Disputes Act on June 25, 1943, and the Executive Order directing the seizure was issued under the same constitutional authority and that of unspecified "laws of the United States".[9] As the War Labor Disputes Act was framed in the light of the seizure here at issue and as the exercise of executive power under that Act followed closely the procedures employed by the Government in the instant case, the presence of the authority of that Act in the

[9] It should be noted that, in support of its argument that there was no Fifth Amendment taking of the respondent's mine, the petitioner assigns the failure of the Government to rely upon any of the eminent domain statutes (Pet. Brief, pp. 42-43). The petitioner remarks especially that the President did not invoke Title II of the Second War Powers Act, 56 Stat. 176, 177. In view of the President's reliance upon "laws of the United States" without specification, it is only fair to assume that the President in the critical state existing at the time contemplated invocation of any and all laws, including eminent domain statutes, which might assist to accomplish the public purpose.

United Mine Workers seizure is inconsequential in applying the holding of the Court as to possession there to this case.

b. *The Taking of Respondent's Mine Is Assimilable to Government Seizure and Operation of Transportation Systems in World War I.* The seizure of the coal mines May 1, 1943, had a forerunning counterpart in the Federal government's seizure and operation of the transportation systems during World War I. The two seizures were so similar in scope and purpose and in many of the details of execution as to render the legal incidents attached by the Court to the earlier seizure persuasive in identifying the corresponding aspects of the coal-mines seizure.

By the Act of August 29, 1916, 39 Stat. 645, the President was empowered to take possession and assume control of any transportation system and use it for such purposes connected with the war emergency as might be necessary or desirable. The Act was enacted to meet a threatened strike of railroad workers which would have imperiled the military operations then being conducted in Mexico, Hull, *Federal Control of Railways*, 31 Harv. L. Rev. 860. Pursuant to this statute and by proclamation of December 26, 1917, President Wilson appointed the Secretary of the Treasury as Director General of Railroads with authority to administer the control of the railroads and took "conclusive" possession and control of the railroads effective December 28, 1917, for the Director General. The stated purpose of the seizure was that the railroads be used for the transportation of troops, war material and equipment and that, so far as their use be not required for that purpose, they be used "in the performance of such other services as the national interest may require, and of the usual and ordinary business and duties of common carriers". On March 21, 1918, Congress enacted legislation, 40 Stat. 451, which set forth in detail how the control assumed by the President should be exercised and provided authority in him to agree

with the railroads upon just compensation for the period of Federal control.

The President's proclamation of December 26, 1917, provided that, until the Director General should otherwise order, "the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operations thereof in the usual and ordinary course of business of common carriers in the names of their respective companies.[10] 40 Stat. 90. It also provided in substance that carriers should not be levied upon but should be subject to all state and Federal laws except as such laws might be inconsistent with Federal control and that they should remain subject to suit and judgment, state taxation, and state police regulations.[11] Also, an order was promulgated by the Director General, providing that "no work involving a charge to capital account in excess of $10,000 shall be contracted for or commenced unless it be authorized by the director of the division of capital expenditures". See *Chicago, Burlington & Quincy R. Co.* v. *Public Utilities Commission*, 68 Colo. 475.

The signs of similarity are marked.[12] Each seizure had its origin in labor difficulties. Each was directed by Presidential order to a member of the Cabinet for substantial execution. Each involved "possession and control" of an entire industry in wartime for a public use. Each con-

[10] Somewhat later managing officials were required to sever their relations with private carriers and became exclusive representatives of the Railroad Administration, U.S.R.R. Adm. Bull. No. 4, pp. 113, 313.

[11] See *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554, 558 footnote 2. By General Order No. 50 of October 28, 1918, the Director General directed that, as "suits are being brought and judgments and decrees rendered against carrier corporations . . . for which the said carrier corporations are not liable", suits (with some exceptions) which might have been brought against the carrier but for Federal control should be brought against the Director General. 256 U. S. 562, footnote 5.

[12] The indications of assimilation were especially noticeable during the first months of the seizures. Starting in March, 1918, Federal control of the railroads gradually was tightened. Commencing at the end of July, 1943, with Amendment No. 1 to the Coal Mines Regulations (Pet. Brief, p. 117), the Secretary of the Interior purported to modify some of the early structures of Government control.

templated the maintenance of operations in the usual course of business. Each reposed immediate management for the United States in the offices of the private owners. Each permitted performance of managerial duties by officers under customary designations. Each continued liability of the private owners to state laws, regulations, and taxation. Each imposed Government consent as a condition upon large and extraordinary disbursements. Each established workers in the industry as Government employees. Each was characterized during its course by the enactment of legislation "legalizing" the seizure, especially by providing for the payment of compensation to the owners. Each provided that property in the possession of the Government should be protected by the criminal statutes protecting United States property.[13] There is no significant reason perceived by respondent for distinguishing the relationship existing between the Government and the railroads in World War I from that between the Government and the respondent.[14]

The Court held that the Government had exclusive possession of the property taken by it under the Act of August 29, 1916, *Northern Pacific Railroad Co.* v. *North Dakota*, 250 U. S. 135, 148; *Duckett & Co.* v. *United States*, 266 U. S. 149; *Phelps* v. *United States*, 274 U. S. 341. In the premises it is believed that the Government took no less possession of the respondent's mine.

2. *The Taking of Possession of Respondent's Mine by the Government Was a Taking of Property.* The respondent maintains that it follows from the Government's possession of the respondent's mine, "including any and all real

[13] *United States* v. *Kambeitz*, 256 F. 247.

[14] If it be suggested that the United States retained the proceeds derived from the operation of the railroads whereas it released all claim to such proceeds in the instance of the mines and that that is significant, the answer would be that the Government has never released either respondent or its Operating Manager from accountability to the Government "for their custodianship and disposition of proceeds from operations accruing during the period of Government possession and control". Amendment No. 1 to Coal Mines Regulations, July 29, 1943, Pet. Brief 117, 122-123.

and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mine", that the Government took property of the respondent within the meaning of the Fifth Amendment. It is, of course, not necessary for a taking of property that the interest taken be a conventional estate in either realty or personalty. See, for example, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106; *United States* v. *Willow Run Power Co.*, 324 U. S. 499, 502. But the petitioner intimates that there is no taking of property here because the Government did not declare that a recognized property interest is being transferred to the United States and assumes thus to distinguish the case from *United States* v. *Westinghouse Electric & Manufacturing Co.*, 339 U. S. 261; *United States* v. *General Motors Co.*, 323 U. S. 373; *United States* v. *Petty Motors Co.*, 327 U. S. 372; and *Kimball Laundry Co.* v. *United States*, 338 U. S. 1.

Quite contrary to petitioner's argument, the estates taken in *General Motors, Petty Motors, Kimball Laundry,* and *Westinghouse* were by classical standards estates less than freehold which are generally what the United States took here in respect of respondent's leasehold. 1 Tiffany, Real Property (3d ed.), § 25. There could be no reasonable ground for supposing that the law extends protection to the taking of a tenancy for a fixed term as in the cases cited while denying it to a tenancy at will: both are legally recognized interests in real property involving possession and the right to possession. 1 Tiffany, Real Property (3d ed.), § 155. The respondent had a transferable interest in the land with the landlord's consent, and consent was not denied in this case. The mere condition that the termination of the tenancy here taken was indefinite as to time and determinable only by the Government is immaterial: in that respect the tenancy was exactly the same as the "fixed" terms taken in the cases sought to be distinguished by the petitioner. It is also pertinent to observe

that the taking of railroad property by the Government in World War I was under circumstances similar to those in the seizure of respondent's mine at least as to the nature of the interest acquired by the United States, and the Court had no difficulty in finding there that compensation was required by the eminent-domain clause of the Fifth Amendment.[15] *Duckett & Co.* v. *United States*, 266 U. S. 149, 151; *Marion & Rye Valley Ry. Co.* v. *United States*, 270 U. S. 280.

The respondent, accordingly, is content to adduce *General Motors, Petty Motors*, and *Kimball Laundry* as established authority for its proposition that that part of respondent's leasehold which the Government took for its use is property for which compensation must be paid under the Fifth Amendment. Although it is difficult, and perhaps idle, to sift out and attempt to treat separately the various items of property comprising respondent's business (which is broadly what the Government took), *United States* v. *Russell*, 13 Wall. 623, affords full protection against the appropriation of those interests of respondent taken by the Government which are not realty or closely related to realty.

3. *United States* v. *United Mine Workers, 330 U. S. 258, Suggests Strongly the Concept of a Compensable Taking of Respondent's Mine.* The Court of Claims found support in *United States* v. *United Mine Workers*, 330 U. S. 258, for its conclusion that there was a taking of respondent's mine under the Fifth Amendment. The Court in *United Mine Workers* noticed the general problem of the relationship existing between the Government and the owners of the mines during the period of Government control there considered. It refused, however, to express an opinion as to

[15] The Court noticed an analogy between a general receivership and the Government's occupation of the railroads. *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554, 559. The petitioner notices at some length an analogy between receivership and the Government's "take-over" of the coal mines. Pet. Brief, pp. 68-86.

the validity of certain specific regulations [16] representing an attempt to define the respective powers and obligations of the Government and the private operators, stating that such regulations would have "little persuasive weight in determining the nature of the relation existing between the Government and the mine workers." 330 U. S. 288.

While declining to examine the effect, if any, of particular regulations upon the Government-operator relationship, the Court in defining the status of the Government as employer and that of miner as employee for the purpose of enjoining assistance in a strike held in effect that the United States enjoyed a most substantial interest in management control of labor. Any interest of sufficient substance to extend to protection against encouragement of a strike would necessarily have also to embrace control over less consequential details of work out of which strikes notoriously grow. Such details would include the subjects of collective bargaining beyond wages and hours as, for example, discharge, lay-off, recall, discipline, promotion and demotion, assignment and transfer, and matters of safety, sanitation, and comfort. They might also include other details commonly regarded as the prerogatives of management but which are frequently claimed by labor as subjects for collective bargaining: size, personnel, quality, and other conditions of supervision, location and extent of work, and the methods and means of mining, preparing, and loading coal. See *Jones & Laughlin Steel Corp.* v. *United Mine Workers*, 159 F. 2d 18 (CA DC). Indeed, the entire recent history of labor struggles in the coal industry in respect both of private operation and of public control has been steeped in recognition of the simple fact that he who controls the miners controls the mine.

[16] The substance of these regulations was contained in the Coal Mines Regulations governing the operation and control of respondent's mine: operations should not be for the account of the Government (incorporated in the instant Regulations by Amendment No. 1 of July 29, 1943, Pet. Brief 118); and private owners should continue liable for all Federal, State, and local taxes and remain subject to suit (Pet. Brief 112).

"Every employee, from the very fact of employment in the master's business, is required to act in his interest. He owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control, and all employees may, as to third parties, act in the interests of the employer to such an extent that he is liable for their wrongful acts." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 488.

It is submitted that the Government as employer of coal miners for any purpose has by that status alone operational control of the mine "in as complete a sense as if the Government held full title and ownership". *United States* v. *United Mine Workers*, 330 U. S. 258, 284.

B

Respondent is Entitled to Recover as Compensation the Amount of the Judgment Below.

It is the position of respondent that the proper measure of compensation for the taking of its mine includes its rental value at the time of the taking, *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motors Company*, 327 U. S. 372; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1; and that such measure includes also the net losses suffered in the operation of the mine by the Government. *United States* v. *Russell*, 13 Wall. 623; *Kimball Laundry Co.* v. *United States, supra.* The record lacks evidence upon which the market value of the interest in respondent's property taken by the United States could be determined. There is no dispute, however, that the respondent lost $36,128.96 in the Government's operation of the mine for its purposes, *supra*, pp.

Just compensation for a taking is adjudged on the basis of what the owner loses, not what the taker gains. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189.

The net amount by which the costs of operating the mine by the United States exceeded its realization therefrom is not only a factor in determining the value of the property taken but is the practical equivalent of part of that property.

The petitioner seized all the mining properties of the respondent, including its funds. It thereafter incurred expenses in the employment of labor, the purchase of supplies, and the accomplishment of all things necessary to continue operations at the mine. It met those expenses through the use of the money, credits, and other property of the respondent. At the same time it received income from the sale of coal and store supplies, the rental of miners' houses, and perhaps from other activities in connection with its operation of the mine. The expenses thus incurred by the petitioner exceeded the income received by it from the operation of the mine by the amount of the net loss, or $36,128.96.

The value to the respondent of this property taken by the petitioner in this respect is represented by the amount of the net loss. As the total net loss which the respondent was entitled to recover was many times larger than the amount of the judgment awarded by the Court as compen-

sation for its loss, the judgment should not be disturbed except as the Court may direct the entry of judgment for the larger amount.[17]

CONCLUSION

For the foregoing reasons, the respondent submits that the judgment of the Court of Claims should be affirmed.

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Attorney for Respondent

December, 1950.

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[17] The Court is asked to observe that, although the Court of Claims found that there was here a compensable taking under the Fifth Amendment, it has awarded the respondent as compensation only the amount which it paid out in increased wages *without the allowance of interest* (R. 48). No reason is supplied by the Court of Claims for this apparent deviation from practice and authority in "taking" cases. It may represent a reapplication of that court's denial of its jurisdiction to award interest when action is brought upon an implied contract arising out of a taking. Cf. *Booth & Co.* v. *United States*, 61 C. Cls. 805, 815-816 (1926). This Court in *Phelps* v. *United States*, 274 U. S. 341, 344 (1927) pointed out the fallacy in that reasoning of the Court of Claims and reversed its judgment denying interest in a case on all fours with the *Booth* case. See 61 C. Cls. 1044. The respondent would, upon the theory embraced by the Court of Claims in deciding the case, be entitled to interest upon its judgment from June 30, 1943, when it made the payments for which the Court of Claims has ordered recovery, *supra*, p. 27.

APPENDIX

Executive Order No. 9340 (8 F. R. 5695) issued May 1, 1943, which is reproduced in the Findings of the Court of Claims (R. 10-11), provided:

> Whereas widespread stoppages have occurred in the coal industry and strikes are threatened which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and
>
> Whereas the officers of the United Mine Workers of America have refused to submit to the machinery established for the peaceful settlement of labor disputes in violation of the agreement on the part of labor and industry that there shall be no strikes or lockouts for the duration of the war; and
>
> Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppage or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work:
>
> Now, therefore, by virtue of the authority vested in me by the Constitution and laws of the United States, as President of the United States and Commander-in-Chief of the Army and Navy, it is hereby ordered as follows:
>
> The Secretary of the Interior is authorized and directed to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened, together with any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal.
>
> In carrying out this order, the Secretary of the Interior shall act through or with the aid of such public or private instrumentalities or persons as he may

designate. He shall permit the management to continue its managerial functions to the maximum degree possible consistent with the aims of this order.

The Secretary of the Interior shall make employment available and provide protection to all employees resuming work at such mines and to all persons seeking employment so far as they may be needed; and upon the request of the Secretary of the Interior, the Secretary of War shall take such action, if any, as he may deem necessary or desirable to provide protection to all such persons and mines.

The Secretary of the Interior is authorized and directed to maintain customary working conditions in the mines and customary procedure for the adjustment of workers' grievances. He shall recognize the right of the workers to continue their membership in any labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, provided that such concerted activities do not interfere with the operations of the mines.

Possession and operation of any mine or mines hereunder shall be terminated by the Secretary of the Interior as soon as he determines that possession and operation hereunder are no longer required for the furtherance of the war program.